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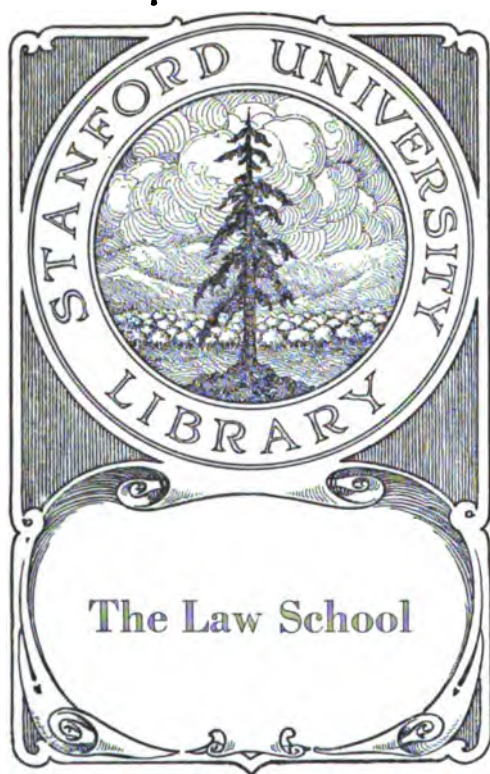
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A
TREATISE
ON
COPYHOLDS.

2617
BY CHARLES WATKINS,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW,
AUTHOR OF AN ESSAY ON THE LAW OF DESCENTS, ETC. ETC.

THE SECOND EDITION,
*Corrected and much enlarged from the Author's Papers:
And further augmented, with Notes of all the more recently
adjudged Cases on the Subject, down to the present Period,*

BY ROBERT STUDLEY VIDAL,
OF THE MIDDLE TEMPLE, ESQ. F. S. A.—THE AUTHOR'S EXECUTOR.

*To this Edition is also added an Appendix of Manorial
Customs, &c.*

VOL. I.

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THE EDITOR'S

P R E F A C E.

IN presenting to the public a new and improved edition of the late Mr. Watkins's Treatise on Copyholds, I do not feel it necessary for me to say much in the way of preface.

To expatiate in detail on the merits of a work, which, even in a first edition, has met with the most flattering reception from the profession at large, and occasionally been noticed with peculiar approbation, by men so eminently distinguished for their intimate acquaintance with the laws of property, as Mr. BUTLER and Mr. PRESTON, would surely be a most unnecessary waste both of time and of words.

With regard, however, to the corrections and additions that are announced in the

title page as having been derived from the author's papers, it may not be amiss to remark, that they are by no means of a trivial nature, but, for the most part, of considerable importance, and, altogether, such as cannot fail to enhance his reputation, and add, in no small degree, to the usefulness and authority of his work.

In preparing this edition for the press, the course, which I had at first determined within myself to pursue, was to avoid, as far as possible, the introduction of any other additional matter than such as the author had himself evidently intended for insertion, and had left behind him in his own hand-writing; but at the urgent solicitation of the bookseller, seconded by the recommendation of some highly respectable professional friends, to whose judgment it became me to pay every sort of deference, I have been induced so far to extend the limits of my plan, as to add a few supplementary notes, embracing the substance of all the more recently adjudged cases on the subject of copyholds, both at

law and in equity, down to the present period. To prevent, however, the possibility of any thing, which I may have thus added, being confounded with the annotations or additional references of the author himself, I have caused it, in every instance, carefully to be inclosed within crotchets.

Should it be thought, as, no doubt, by some it may, that this edition might have been brought forward to more advantage under the superintendence of a person of maturer judgment or greater practical experience, I have only to remark, that, feeling to its full extent the weight of the task, I could have been well content, as far as respects myself, to have committed the execution of it to abler hands, but that had I done so, I am certain that I should have acted in direct opposition to the wishes of a most excellent and highly valued friend, who, on quitting this world for a better, committed his papers and every thing else that he held most dear and valuable here on earth, in an especial manner to my care, and bad me to remember, that he did so in

consequence of my having possessed his confidence beyond any other man breathing.

ROBERT STUDLEY VIDAL.

17 Nov. 1815.

Abstract of
stat. 55 Geo.
3. c. 192.
whereby dis-
positions of
copyhold
estates by will
are made ef-
fectual with-
out previous
surrenders to
the uses
thereof.

P. S. The greater part of this volume having been printed before the passing of the late Act for removing certain Difficulties in the Disposition of Copyhold Estates by Will, the Reader will I trust excuse my so far trespassing on his indulgence, as to request him to note in its proper place, that, by stat. 55 of his present Majesty, c. 192. it is enacted, That in all cases where by the custom of any manor in *England or Ireland*, any copyhold tenant of such manor may by his or her last will and testament, dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made, or to be made, by any such last will and testament, by any person who shall die after the passing of the said act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament

of such person, as the same would have been if a surrender had been made to the use of such will.

Provided that no person entitled, or claiming to be entitled to copyhold lands, tenements, or hereditaments, in consequence of any testamentary disposition, shall be entitled to be admitted to the same by virtue of any thing in the said act contained, except upon payment of all such stamp duties, fees, and sums of money, as would have been lawfully due and payable in respect of the surrendering of such copyhold lands, tenements, or hereditaments, to the use of such will, or in respect of the presenting, registering, or enrolling such surrender, had the same lands, tenements, and hereditaments been surrendered to the use of the will of the person so disposing of the same; all such stamp duties, &c. to be paid in addition to the stamp duties, fees, or sums of money due or payable on the admission of such person so entitled or claiming to be entitled to the same copyhold lands, tenements, or hereditaments, and the stamp duties to be affixed to the copy of the admission.

Persons admitted under such testamentary dispositions to pay the like fees, &c. as would have been payable on such surrenders.

Provided also, that nothing therein contained shall be construed, deemed, or taken, at law or in equity, to render invalid or ineffectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title,

Proviso as to not rendering ineffectual any devise that would otherwise have been valid, &c.

or interest, in or to copyhold lands, tenements, or hereditaments, which would be valid or effectual if the said act had not been made; or to render valid and effectual any devise or disposition of any copyhold lands, tenements, or hereditaments, which would be invalid or ineffectual if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same by will; any thing therein before contained to the contrary notwithstanding.

THE AUTHOR'S
PREFACE

TO THE FIRST EDITION.

WHEN a Treatise on the Subject of Copyholds is so generally declared to be wanted, an apology for the publication of a Treatise on the Subject of Copyholds cannot be requisite. A treatise on that subject is, therefore, thus presented to the world.

If what is perfect cannot be attained, it can be no reason why that which is useful should not be attempted. The Author has taken some pains to make the following Treatise useful; but it must not be expected that he has made it perfect. If his labours have not produced what has been wished, they may, at least, shorten, in some measure, the labours of others, and assist some one, blessed with better powers than himself and with circumstances more propitious, to give to the profession a Treatise more complete.

He has, where the subject would admit of it, been brief: for a multiplication of words is too often a multiplication of doubts and difficulties. In his references he has been frequent; and he hopes correct; that if errors have escaped him (and whom have they not escaped?) they may be detected. In order to prevent misconception, he has generally given the writer he has cited in the writer's own words; though, at the same time, he has carefully directed the reader where the passage may be found. Nor has he been so fastidious as to reject a form of expression which he himself had adopted, when, in some prior publication he had occasion to treat on the subject immediately before him, merely because it had already occurred.

He has generally also contented himself with barely referring to the published reports of cases. For had he given those reports at length (which might have been done without any great *mental* exertion) he should only have made the reader pay once more for what, perhaps, he had paid half a dozen times already: and even if he had given them at length, the books themselves must have been resorted to at last. A few cases, indeed, are given at length: but that was because those cases were *not* before in print; and which,

therefore, perhaps, constitute the most important part of his work; and for those cases he is chiefly indebted to the friendship of Mr. BUTLER.

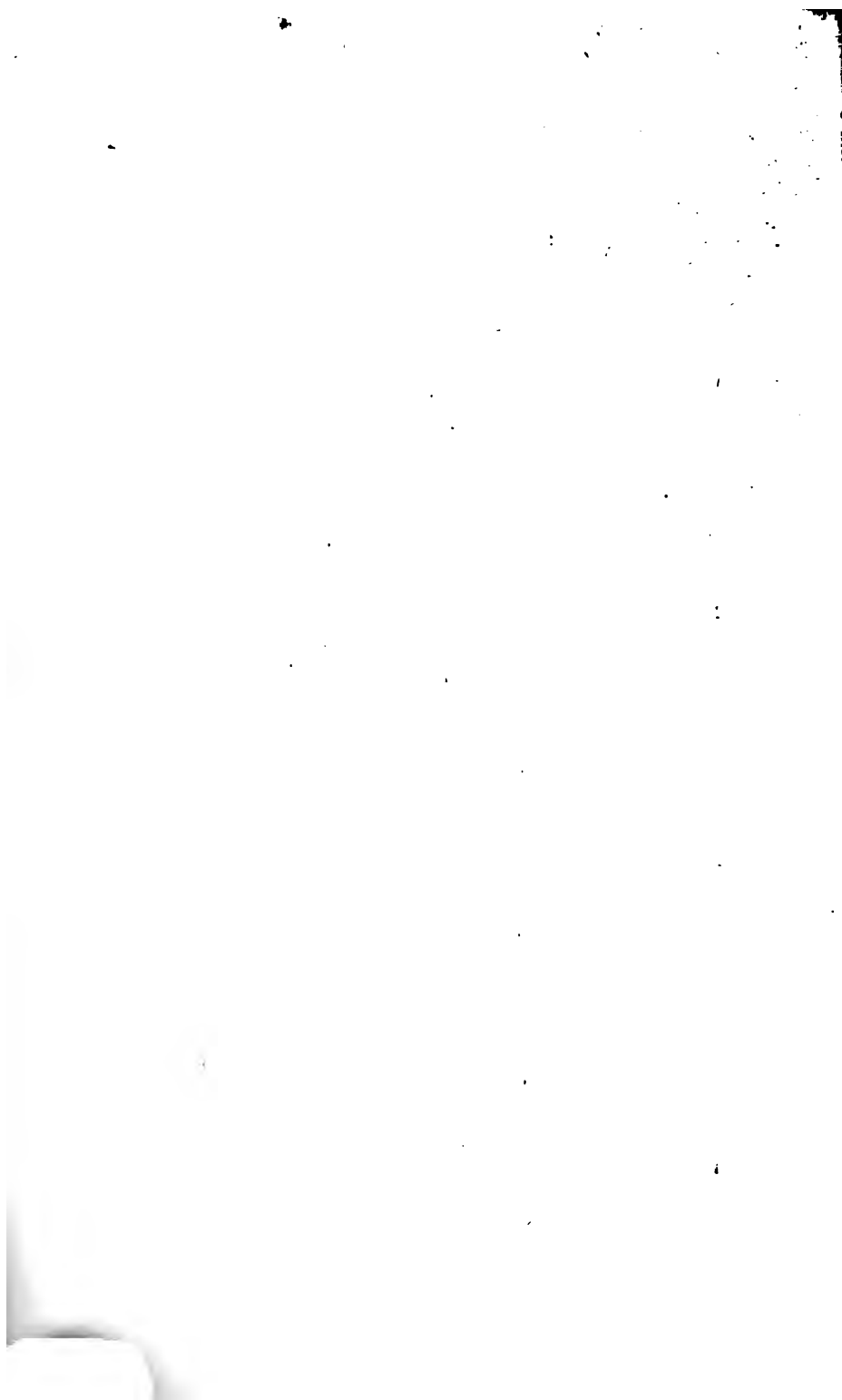
He has endeavoured to extract something at least like consistency from the crude mass of matter which the books afford. He has even endeavoured to reconcile the jarring and discordant cases on several points which he had to consider; but this, he must confess, sometimes appeared to be rather out of the reach of the powers usually allotted to humanity; and which he, consequently, could only lament. He has endeavoured also to reduce some cases to acknowledged principles, and to rescue others from the clouds of mystery in which they had been so long enwrapped; and if he has been *guilty* of unusual freedom in so doing, in calling in question the doctrines consecrated by time or by *authority* (as it is too frequently termed; as if any thing could be an authority against truth!) but which, perhaps, had nothing but time or such authority to consecrate them, he can only say that he is sorry that such freedom had not been exerted by others before him, rather than left unexerted till so late a day.

Truth is generally found in simplicity. Mys-

tery and authoritative assertion may, indeed, be of service to error and to ignorance—to oppression and to deceit; they may, at certain periods, support a creed in religion, or an absurdity in law; nay, they may even consecrate an Inquisition, or form the outworks of a Bastille: but he would hope that the days of mystery and authoritative assertion are past. He has considered assertion as assertion; and cared not by whom such assertion was made; as he conceived that no man, however great he might be deemed, could plead exemption from what was just; or make right wrong, or wrong right. It was an observation of a noble person (though that noble person, perhaps, deserves but little to be quoted,) that few things were so *uncommon* as *common sense*: and certain it is that man frequently takes more pains to *reason* himself out of *rationality* than would have led him into the paths of truth.

The Author, therefore, has aimed at being explicit and concise; and if he should be so fortunate as to succeed in his endeavours to communicate information, however small the portion may be; if he should simplify the doctrines he has treated of; or remove one error from the many which surround us, or induce another to do so; he shall think that his time and his labour have been profitably bestowed.

The present volume contains the **DOCTRINE OF MANORS, GRANTS, SURRENDERS, ENTAILS, REMAINDERS, EXECUTORY INTERESTS AND TRUSTS, ADMISSION, FINES, FORFEITURES, EXTINGUISHMENT AND SUSPENSION, AND ENFRANCHISEMENT**; which includes the nature, creation, transfer, and destruction of Copyhold Interests. If his health and professional engagements shall permit him, he intends to resume the subject, and give a second volume on **COURTS, CUSTOMS**, (comprehending the doctrine of **FREE-BENCH, CURTESY, DESCENTS, &c.**) **SERVICES, as HERIOTS, &c. &c.** And as such second volume will, in many parts, relate more immediately to local matter than the present one, the communication of any curious entries, customs, &c. relative to particular manors, will be much esteemed.



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ON

ON
COPYHOLDS.

CHAP. I.

OF MANORS.

FROM ages remote and rude have we derived many of the most important maxims of our jurisprudence, and the radical, and, perhaps, the purer principles of our polity.

Introductory
remarks.

But we are not to estimate either the civil or political constitution of a nation by its antiquity, but its wisdom. Many are the principles, both of polity and jurisprudence, which, as they are founded in nature, must continue through all periods invariably just; while there are others, of arbitrary imposition, flowing from a peculiar state of manners, or suggested by emergency, which

it will, when that emergency has ceased, or the manners of a people are meliorated and refined, become the hand of wisdom to remove.

[2] If it becomes man to concentrate every energy in preserving the principles of rectitude and liberty, of national safety, and of individual peace, from being crushed by the strong and unrelenting hand of power, or withered by the blasting breath of an all-contaminating corruption, it should also be his care to prevent their being frustrated and supplanted by a narrow adherence to arbitrary rules: he should cherish those principles which ought never to die, and he should suffer those to die which were never intended to live.

If the radical principles of our legal or political system partake of the barbarity, they partake also of the liberty, of earlier times. The arm of the savage, which repelled an outward enemy, was lifted against an internal foe. He who had but few wants, had consequently but little dependency; and, by being jealous of the power of others, he learned to preserve his own.

We too generally associate the ideas of tyranny and oppression, of despotism and slavery, with those of the feudal system. But the feudal system originated in freedom; and that system was corrupted when it ceased to be free (a).

Although admirably calculated for individual freedom and for national strength, it was, like other ancient systems, calculated more immediately for war. Inimical to commerce and the arts; incompatible with the progress of improvement in after ages; many of its principles became gradually obsolete and were lost: but laws founded on those principles were permitted to continue, when the principles on which they were founded were forgotten or condemned. [3]

Hence, many of our usages and laws appear arbitrary and needless, of uncertain import or of capricious imposition, to those, who, regarding them merely as existing rules, are unmindful of the times in which

(a) See *Watk. Introd. on the Feudal System*, prefixed to *Gilb. Ten. Watk. on Desc.* ch. 1. s. 1. p. 7. n. (A) and ch. 3. s. 1.

their principles were suggested, and of the policy which gave them birth. But to the history and manners of the times must we recur, to illustrate those laws which were ordained in ages that are past, and those customs to which we have succeeded, as it were, by inheritance; to trace out their origin and mutation, the principles whereon they were founded, and their relation to the general system of our legal polity.

The principles of our laws derived from it.

That our legal system, as it is relative to property, is derived from that which is usually denominated the feudal, and that the feudal system owed its origin to the gothic tribes, seems sufficiently evident (b).

Its origin and progress.

In rude ages the individual is generally found to be free. The nation is an aggregate of freemen, associated for general protection and defence: though each has a kind of individual independency, each forms a part of a great whole: each is amenable to society, and each is a composite portion of the state.

(b) See *Wask.* ubi supra.

Man is guided by facts before he reasons abstractedly. Authority over individuals, and property in the soil they inhabited, were not to be vested in this or in that individual, but in the society which the aggregate [4] formed. Property and power, therefore, were lodged in society; but society was an abstract idea. It was, consequently, requisite that society should be *represented*; and hence arose the chief political person of the state (c). As society was entered into for general defence and individual protection, some one was necessary to lead forth armies, to administer justice, and to apportion lands.

The king was the representative of society.

But, in early times, a nation frequently consisted not only of an aggregate of individuals, but also of an aggregate of smaller states: it was composed of an assemblage of families or tribes: it was a federal union of originally independent clans; each of which continued distinct, though their unity formed the state.

(c) See *Watk. on Descents*, c. 1. s. 1. p. 7. n. (l). c. 3. s. 1. p. 92. &c. *Reflect. on Gov.* s. 5. p. 66. &c. and on the *Feudal System*, pref. to *Gilb. Ten.* &c.

And the lord
of his clan.

Each horde or clan, notwithstanding its union with others, was, as far as related to the persons composing it, in itself a nation. It had its representative who conducted the people to war, and who administered justice among them in peace. He frequently succeeded by inheritance (*d*); not indeed by right, but by custom: for most of these clans were families derived from a common parent, in which the paternal authority was not perhaps wholly effaced. But, when several tribes, originally independent on each other, confederated and composed a general society, the representative of that society, whether its powers were to be vested in an individual, or delegated in portions to many, must necessarily have been chosen by the united clans.

When the northern nations abandoned their native plains, and over-ran, and, at length, settled on the ruins of the Roman power, these principles and usages were observed. The great chief of the united

(*d*) Vide *Tacit. de Moribus Germ.* c. 7. And see *Sulliv.* sect. 3. p. 27, 8. *Watk. Reflect. on Gov.* 66.

MANORS.

states was the generalissimo of the emigrating army; and each clan or family was marched under the banners, and afterwards settled under the protection of its respective chieftain or lord.

On a country or district being conquered, the confederated tribes composing the general army, or the confederated barons or individuals who composed an invading and adventuring party under the direction of their original or elected (e) chief, became entitled to their portion of the spoil.

The victorious army, or party of adventurers, however numerous or however few the component individuals, was a social and connected body; and its representative was its conducting chief. The conquered district was the property of the social body; and, on its division, each person entitled held his allotted portion of the state. The

Division of
lands.

[6]

(e) *Boulainvilliers Etat. de la France*, tom. 1. *Mem. Histor.* 15. *Lacombe Abregé Chronologique de l'Histoire du Nord, Hist. de Dannemarc*, an. 772. tom. 1. p. 49. *Watk. on Desc.* c. 3. s. 1. p. 94.

chief represented that state; and the individual held his portion of his chief. The first division was to be among the clans, or, in the case of small parties, among the individual adventurers, under certain services; and these portions allotted were held immediately of the state: the persons to whom they were allotted were the tenants *in capite* of after days. The portion of country assigned to a clan, was, in the same manner, vested in the leader or chieftain of such clan: these chieftains were the *Mesne lords*. barons of the state. Each of these portioned out the allotment he received among his immediate followers; who also divided parts of their shares to others who were dependent immediately on them. These inferior chiefs were those who afterwards were denominated the *mesne lords*.

Demesnes.

What remained unallotted by the king, or the respective chieftains or lords, was said to be in his *demesne*, or in his immediate possession and use. These demesnes, if not suffered to lie waste, were cultivated by his own servants, or granted out in small allotments to persons who, not being freemen, had no title to a share on the former

division; and these allotments were resumable at his pleasure; for so dependent and servile was their state, being mostly the captivated natives of the countries which were over-ran (*f*), that they were not only incapable of a durable property, but were themselves considered as the property of their lord. In after-times, indeed, many who were free in their persons accepted these gifts, under services denominated *villain* or base services; but these were frequently such as were expelled from their free possessions, by the strong hand of turbulency and oppression, and driven by necessity to accept what, in better days, would have been considered as derogatory to a freeman (*g*). [7]

Thus part of the portion allotted to the king or lord, was held by his followers in frank-tenure, under certain services and returns, and part remained in his hands, either waste, or cultivated by his villeins or

(*f*) And see *Britt.* cap. 31. *de Naisfe*.

(*g*) *Bract. Tr.* 1 lib. 4. c. 28. s. 5. *Fleta*, lib. 1. c. 8. s. 2. *Britt.* c. 66. *Fitzh. Abr. Prescript.* pl. 29.

Manors. meaner dependants. The whole territory of the lord was denominated his manor or barony, his honour or lordship, according to the language of the day.

Etymology of the term. Many and discordant have been the conjectures on the etymology of the term *manor* (*h*). But that which appears the most just, is, that the term is derived from the French *mesner*, which signifies to govern or to guide; because the lord of a manor has the guidance and direction of all his tenants within the limits of his territory: "and this," says Sir Edward Coke, "I hold the most probable etymology, and most agreeing with the nature of a manor; for a manor in these days signifies the jurisdiction and royalty incorporate, rather than the land or scite (*i*)."

(*h*) See *Spelm. Gloss. voce Manerium. Cowell. v. Manor. Co. Copyh. s. 31. Tr. p. 51-2. Boullainvil. Etat. de la France, tom. 1. p. 41. Whit. Manch. b. 1. c. 8. s. 3.*

(*i*) *Co. Copyh. s. 41. p. 52.* Thus the term *manorhood* occurs in old customals, especially in those of the north, and is used in this sense: "And he further saith that the privileges of the game of fishing, fowling, hawking, and hunting within the said forest and park (of Stanhope) with the manorhood of the inhabitants

This etymology most certainly accords with the nature of the thing. The chief or prince, in most ages and nations, possessed the civil with the military power. The baron led his tenants to war, and he administered justice among them in peace. His jurisdiction was commensurate with his territory. His tenants assembled in his hall, where justice and equity were dispensed. This court, called the hallmote (k) from the place in which it was held, or the court baron from the territory to which it belonged, was absolutely incident to the manor. It was of its very essence: it appertained to it of necessity. It was inseparable from the barony; which could not even exist without it. And the *suit of court*, or the obligation of attendance, was also inseparably incident to the feud.

Judicial
power of the
lords.

Court baron.

In this court the suitors were judges (h): [9]
the freeman could only be tried by his

Trial by
peers.

within the parish of Stanhope, belong to the bishop of Durham's forrester for the time being." Deposition relative to the customs of Weardale in Durham, A. D. 1595.

(k) See *Spelm. Gloss. voce* Halmote, and 4 *Inst.* 268.

(h) *Co. Lit.* 58. b. 4 *Inst.* 268.

peers (m), his equals, his fellow frank-tenants. Hence if the lord had no tenants, by reason of escheat or the like, he had none over whom to exercise jurisdiction. If he had but one tenant, that one, having no peer, had no judge; and consequently he appealed to the court of the lord immediately above. Hence we find in our books, that if there are not two frank suitors at the least (n), the court baron cannot be held, and consequently that the manor is destroyed. But it should seem that there must be *more* than two frank tenants holding of the manor, to enable the lord to hold a court *; for otherwise, if one of those two was the plaintiff, and the other of those two the defendant, the lord would be under

(m) *Magna Carta*, c. 29. Vide *Lindenbrogius Cod. Leg. Antiq.* 679. *Li. Longob. Tit.* 8. and *Spelm. Gloss. voce Pares Curie & Parium Judicium.*

(n) *Bro. Court. Bar.* pl. 22. *Comprise*, pl. 31. *Kitch.* 4. a. 3 *Durnf. and East*, 445. *Glover v. Lane.* 2 *Ld. Raym.* 863-4. *Tonkin v. Croker.*

* There must be twelve to try issues. See *Kitch.* 113. a. and b. *Co. Lit.* 155. a. n. (3). *Cro. Car.* 259. 1. *Roll. Abr.* 564. *Customs.* I. pl. 17. *Tr.* 17. *Edw. 3.* pl. 40. f. 44. a.

some difficulty to try them by *their peers* (o). Upon the continent indeed, at a certain period, the lord who had not a sufficient number of peers for the purpose, might [10] have borrowed or hired a few of the lord paramount (p); but as he could not compel the peers he had borrowed to give judgment, it seems that the circumstance stood him but in little stead. Hence, perhaps, the practice so soon declined.

If the party was dissatisfied with the judgment of his peers, he might have appealed them; that is, he might have fought

(o) The truth seems to be that there should be so many frank tenants, as, in case of an action, to leave a plurality of suitors to sit as judges in the cause. There is an instance in the register, f. 11 b. and 12 b. of a cause being removed out of a court baron, by reason of there being but four* suitors there. See the register, *ubi sup.* and *Bro. cause, a remover plee*, &c. pl. 35. and see also *Britt. cap. 120. de Court de Baron*, f. 274. b. 275. a. T. 17. *Edw. 3.* pl. 40. f. 44. a.

(p) *Montesq. Esp. des Loix*, liv. 28. c. 27. &c.

* In the manor of Dymock, in the county of Gloucester, there must be three benchers of the free-suitors at the least, or no court can be holden: and this by ancient custom. See *Appendix, No. I. Customs of Dymock.*

them; he might have dared them to the combat, and appealed to the decision of heaven. If he did not appeal till judgment was pronounced, he was obliged to fight the whole bench (*p*). And it is observable that their sense of honour, and of their own importance and independency was such that the lord could not (and cannot even now, in this nation, unless warranted by custom,) (*q*) compel the free-suitors, as between party and party, to be sworn: this would have been to call their honour in question *. Hence, perhaps, the suitors in a court baron are called the *homage* or *homagers*, or *benchers*, and not the *jury*, to this day.

Customary
court.

Again, the lord had a court for his vills (*r*), who held at his will by copy: for

(*p*) *Montesq. Esp. des Loix*, liv. 28. c. 27. &c.

(*q*) 2 *Inst.* 142. *Bro. Court Bar.* 2. and 23. See also stat. 52. *Hen.* 3. cap. 22. and compare with 2 *Inst.* 49. a. and *Mag. Cart.* c. 29. and ante p. [9.] (*m*).

* So the *peers of the realm* are not sworn in giving judgment at this day. 2 *Inst.* 49.

(*r*) The *court baron* is frequently called by *Britton*, and other ancient writers, "*la court des francks homes*,"

the suitors in the court baron, could not notice the claims of the villeins who were of a different order of men. In the court of the copyholders, or customary court, as it was frequently called, were all matters relative to the tenements held by copy transacted. But the copyholders not being originally free in their persons, nor holding by frank tenure, were not entitled to be tried by their peers. The lord himself, or his steward who sat for him, was the judge of their court (s): they were his villeins, and dependent on his will. As they were beholden to his favour for their lands, so he might have resumed those lands at his pleasure. To this court, however, the copyholders owed suit as the free tenants did to the court baron; and, like the latter, were denominated the homage: not indeed that the copyholder ever did homage ex-

[11]

or the court of the *free-men*; (See *Britt.* cap. 120. fol. 275. a.) as contradistinguished from the customary court, or the court of villeins. “The court baron, *id est*, the court of the freeholders.” *Dugd. Origines*, ca. 9. p. 25. See also 4 Co. 96. b. Co. Lit. 58. a.

(s) *Co. Lit.* 58. b. See *Watk.* No. lxxxviii, lxxxix, cxi, to *Gilb. Ten.* p. 432. &c. 447. &c.

pressly, as the frank tenant did, on acceding to the tenancy; for homage could only be done by a freeman. For to what purpose could it be to make the copyholder say, "I become your man from this time forth," when he was the lord's man already by reason of his villeinage? And in after days, when those who were free in their persons accepted lands to be held by copy, they were still only tenants *at will*. It should seem, therefore, that they were so called in the customary court by way of analogy to the homage in a court baron, and that the term was derived from the latter court.

[12] Having thus cursorily remarked on the origin of manors, we may proceed to inquire into the possibility of their creation at this day; and into the means by which they may be divided, suspended, or destroyed.

Creation of
manors.

With respect to the first branch of our inquiry, it is very generally laid down as law, that a manor cannot be now created (*t*).

(*t*) *Bro. Comprise*. 31. 2 *Roll. Abr.* 120. *Manor* (A). *Kitch.* 4. a. 2 *Bl. Com.* 92. ch. 6. *Cro. Eliz.* 38. *Morris v. Smith*.

By the statute of *quia emptores terrarum*, (u) the tenants of common lords were prohibited from granting any part of their lands in fee, to be held of themselves; but whether they aliened the whole or a part, (for that act enabled them to alien the whole,) the feoffee was to hold immediately of the lord above.

However, the statute of *quia emptores* did not extend to the tenants *in capite* of the king; and consequently it should seem, from the statute *de prerogativa regis* (w), that they might have aliened part of their lands, even without licence, and, from what appears, to have been held of themselves, till the 17th of Edward the Second; so that sufficient was left to answer the services due: but yet the statute 34 Ed. III. c. 15. was afterwards enacted, confirming the grants made by such tenants in the time of Henry the Third, but saving the prerogative of the king, of the times of his grandfather, his father, and of his own time. [13]

(u) 16 Ed. 1. Westm. 3.

(w) 17 Ed. 2. st. 1. cap. 6.

Now the statute of *quia emptores terrarum* is expressly confined to alienations in fee simple (*x*). And it is acknowledged, that if a person at this day, seized in fee-simple, give lands to another in tail, or for life, the donee in tail or grantee for life shall hold of the donor (*y*). Here then is a tenure confessedly created. If a person seized in fee-simple of a thousand acres of land which are held by him of a single lord, should grant out certain portions of such land to twenty persons for life, which he certainly would be warranted in doing, it may be asked would he not have a manor? The grantees are *his* tenants; they are not tenants to the lord above. In answer to this, it is said (*z*) that though he may create a tenure, he cannot create a manor: for a manor cannot be without a court; and a court cannot be but by continuance time out of mind. But, says

(*x*) "Et sciendum est quod istud statutum tenet locum de terris venditis tenendis in feodo simpliciter tantum." Cap. 3.

(*y*) *Lit. s.* 19. *Co. Lit.* 23. a. 143. a. *Perk. s.* 637. *Fitzh. Abr.* tit. *Avouerie*, pl. 31.

(*z*) *Bro. Comprise.* pl. 31. 2 *Rol. Abr. Manor*, (F) f. 121-2. &c.

Sir Martin Wright (a), it is an obvious objection to this reasoning, that the like reasoning might have prevented any manors at all. And another objection to this reasoning is, that if it be absolutely necessary that a court should have existed time out of mind, the manor to which that court belonged must necessarily have existed time out of mind also; and if so, what becomes of the doctrine that manors might have been created by a tenant of a common lord till the statute of *quia emptores*, or by a tenant *in capite* of the king till the 34th of Edward the Third?

[14]

For the truth seems to be, from the very nature of the thing as well as from historical facts, that the court was dependent upon the manor, and not the manor upon the court. The manor was the principal; the court was only an incident. On the creation of a manor the court baron followed of necessity.

With respect to the tenant *in capite*, was the stat. 34 *Ed.* 3. a repeal, *ex necessitate*, of the sixth chapter of the statute *de pre-*

(a) *Ten.* 158, 9. n. (h).

rogativa regis? Upon the supposition that it was, it does not follow that the tenant *in capite* might not have aliened *with licence*. Even the stat. *quia emptores*, might, it is said, (b) have been dispensed *with* by the lord: and the king was within that statute when the lands aliened under it were held of him *in capite ut de honore*, (c) though he was not bound when they were held *in capite ut de corona* (d). It does not, therefore, seem to follow of necessity that the creation of manors must have ceased in the reign of *Edward* the first. For though it is true that it is essential to a manor that there be tenants who hold of the lord, yet the position, that, by the operation of the statutes we have cited, no tenant *in capite* since the accession of *Edward* the first, and no tenant of a common lord since the statute of *quia emptores* can create any new tenants to hold of

(b) See *Bro. Ten.* pl. 2. *F. N. B.* 211. l.

(c) *Wright's Ten.* 162.

(d) See *Gilb. Ten.* 52. and *Watk. n.* (i). King, &c. might licence to alien, and so a tenure be created. *Bro. Ten.* 65. which refers to *F. N. B.* 211. [l.] which see. Licence was granted by Queen Eliz. to Henry Neville, to alien lands in *Mayfield* to be held of himself.

himself (e), appears diametrically contrary to [15]
 fact: unless, indeed, we suppose that it be
 absolutely essential to the very existence of
 a manor that the tenants should be tenants
 in fee: the necessity of which the whole
 history of feuds and the present system of
 copyholds seem most completely to negative.
 But granting even that the tenants must ne-
 cessarily have held in fee, it appears that
 the tenant *in capite* might have aliened in fee
 with licence after the passing of the latter
 act*.

However, as our immediate consideration
 of the creation and progress of manors is re-
 lative more particularly to the doctrine of
 copyholds, it may suffice, without at-
 tempting to reconcile each position with
 principle, to remark that it should seem to
 be laid down as law, in a way not now to be
 disputed, that no such manor can, at this day,
 be created, *of which a copyhold can be held.*
 A copyhold must be held "according to the
 custom of the manor," and a custom, it is

(e) See 2 *Bl. Comm.* 92. ch. 6.

* *Vid. supr.* note (d).

said, must be from time whereof the memory of man is not to the contrary. Though a person, therefore, may, at this day, create a tenancy, yet he cannot at this day create a custom: and if he cannot at this day create a custom, he cannot at this day create a manor of which copyholds may be held *.

[16]

* The efficient cause of a manor is expressed in these words,—*of long continuance*. Hence it is, that the king himself cannot create a perfect manor at this day: for such things as receive their perfection by the continuance of time, come not within the compass of a king's prerogative; and, therefore, the king cannot grant freehold to hold by copy, neither can the king create any new custom, nor do any thing that amounteth to the creation of a new custom. *Co. Copyh.* s. 31. Tr. 45, &c. And as the king can do nothing which amounteth to the creation of a new custom, so a common person can do nothing which amounteth to the creation of a new tenure. p. 47. He then distinguishes between a perfect tenure (or fee simple,) and an imperfect one, (or for life, &c.) 48.; and so on to the circumstance of the court-baron. 49. Grant of a manor, see *Hob.* 170. A manor lying in three vills,—grant of in two vills,—that which is in the third vill will not pass. See *Brooke, Grant*, 88. and *Done*, 26. Q^{ry}. What becomes of the proper manor? Shall the grantee have it; or, shall it remain to the grantor; or, is it *extinguished* as to the two vills granted?

A copyhold cannot be granted "according to a custom" which does not exist.

And wherefore, it may be asked, then urge these objections to the propriety and justice of a doctrine which it would be needless to combat? To remind the student that it is his duty to think and to reason for himself. That if he implicitly acquiesces in what is absurd or unintelligible, he adopts it, and makes it his own; but that, if after investigation he is obliged to submit, he should regard it as the absurdity of others which he is not to answer for, but to mark.

The law relative to the *division* of a manor seems to be involved in still more uncertainty and doubt.

Division of
manors.

Before the statute of *quia emptores terrarum*, as a manor might have been created, so it might have been divided; and the number of manors of consequence, encreased (*f*). But if, according to the doctrine before noticed, a manor could not have been created

(*f*) Vide *M. 8. Ed. 2. f. 250. Mayn. Kitch. 4. a.*

since the passing of that act, by a tenant of a common lord, it should seem to follow, that, since the passing of that act, a manor cannot be divided into separate manors, by the tenant of a common lord, as such division would be a multiplication in effect *. However, a distinction has very properly been made between a division by act of law, and a division by act of the party.

[17] It appears to have been acknowledged by the ancient books (g), and often recognized by later authors (h), that a manor might

* And, as a manor cannot be divided, by the act of the party, into two, so two manors cannot be united into one. *Co. Copyh.* s. 31. *Tr.* 47-8. and see *Plowd. Quarries*, Q^y. 65. Grant of the manor of A. except lands in B.: the copyholds in B. cannot be granted by the owner of the lands in B., there being no manor of B. *Cro. Eliz.* 442. *Bright v. Forth*. "A manor cannot be severed." *Per* Glanville, *Cro. Eliz.* 443.

(g) *M.* 17. *Ed.* 3. pl. 102. f. 72. b. *Pasch.* 9 *Ed.* 4. pl. 18. f. 5. a. *Trin.* 12 *Hen.* 4. pl. 13. f. 25. b. *Mica.* 11 *Hen.* 6. pl. 10. f. 26. a. *Trin.* 26 *Hen.* 8. pl. 15. f. 4. a. and vide *Mad. Baronia Anglica*, b. 1. c. 3. p. 39. 59.

(h) 4 *Co.* 26. b. 6 *Co.* 64. a. &c.

have ben divided, subsequently to the stat. *quia emptoris*, by act of law. As if a manor descended to several coparceners, and such coparceners made partition, each should have had a manor, in case part of the demesnes and services were allotted to one and part to the other (i). But though the *manor* might have been divided, the *tenancy* could not have been so; as if a tenant held by rent and certain other services, and the coparceners, on partition, apportioned the rent and services, neither could have avowed without the other (k).

With respect, indeed, to joint-tenants, it is said that the manor shall not be divided as in cases of parceners; as joint-tenants come in by purchase (l); though *Anderson* thought there was no difference between them (m).

(i) Vide *Trin.* 26 *Hen.* 3. pl. 15. f. 4. a. &c. as in (g).

(k) *Mich.* 17 *Ed.* 3. pl. 102. f. 72. b.

(l) *Cro. Eliz.* 39. per Periam J. in *Morris v. Smith & Paget*, and 1 *Leon.* 27. S. C.

(m) 1 *Leon.* 28.

But whether a manor can be divided by *the act of the party* does not appear to be by any means settled. Most of the ancient cases are relative to acts of law; and most of the modern ones are deductions from them.

[18] In Sir *Moyle Finche's* case (n), a distinction was taken between acts of law and of the party: and Sir Edward Coke affirms, in a note to *Melwich's* case (o), that a lord cannot by his own act make of one and the same manor, at the common law, sundry manors consisting of demesnes and freeholders *. There is, however, a great contrariety of opinion on this point, as may be seen in the books cited in the margin (p).

(n) 6 Co. 63. a.

(o) 4 Co. 26. b. and see *Gilb. Ten.* 210-12. and 6 Co. 63. a.

* Manor of C. extending over C. and B.—Recovery of the manor, excepting the lands in B. and in B. were copyholds, demesnes, and services;—resolved, that copyholds could not afterwards be granted in B. See *Cro. Eliz.* 442. *Bright v. Forth.*

(p) *Gilb. Ten.* 210-12. *Cro. Eliz.* 19. *Harris & Haies v. Nicholls*, *ibid.* 38. *Morris v. Smith & Paget*, 1 *Leon.* 36. *Marsh & Smith*, *Cro. Eliz.* 309. 4 Co. 26. b. 6 Co. 63. a. &c. and see 15 *Viner*, 223. *Manor* (G.)

To reconcile these, would be a task of no small difficulty. But I must confess that none of the ancient cases that I am aware of, many of which are so generally referred to, by any means amount, in my conception, to warrant the doctrine that a manor *may* be divided by *the act of the party*; and the inconveniency, if not the nature of the thing, militates, I think, strongly against the adoption of such a doctrine.

If the lord grant the freehold and inheritance of *all* the copyholds within his manor, to a stranger in fee, it is said (*q*) that the grantee may keep a customary court, and regrant the copyholds in case of escheat, &c. For this, say they, is only the division of the courts; and the legal manor remains in the original lord.

Separation of the customary part of a manor from the free.

But a doctrine like this is justly questionable, and perhaps, on investigation it will appear, not only incompatible with principle, but even destitute of authority itself. [19]

(*q*) 4 Co. 26. *Melwich's case*.

It was acknowledged, in the cases of *Murrel* and *Smith* (r) and *Melwich* and *Luter* (s), that, by the grant, the copyholds were severed from the manor. To have permitted the act of the lord to destroy the interest of his copyholders, would certainly have been unjust: and it would have been inconsistent with the very grant that the copyhold interest should be turned into freehold, as the freehold was the subject of the grant. But surely, it must be evidently repugnant to undeniable principles, to say that the grantee of the inheritance should, in case of escheat or the like, be warranted in granting the premises by copy again. A copyhold must, in its very nature, be *within* and *parcel of* a manor, and held at the will of the lord, according to the custom of the manor of which it is so held. On a re-grant, in the present case, therefore, *within* what manor shall the premises be deemed? What manor are they to be parcel of? According to what custom are they to be held? By the conveyance of the freehold they were severed from

(r) 4 Co. 24. b. Cro. Eliz. 252.

(s) 4 Co. 26. a. Cro. Eliz. 102.

the original manor; they were no longer within, or parcel of *that* manor; nor can they be held according to the custom of that manor of which they have ceased to be held at all. The grantee of the inheritance of the freehold, must hold of the lord above; [20] but the copyholders must hold of the grantee. The copyholds, therefore, on a regrant, could not be held according to the custom of the manor paramount; and it should, consequently, seem that they could not be regranted by copy at all.

And, if we look into authorities, the doctrine appears equally destitute of support. If the lord grant the inheritance of *one* copyhold only, it is acknowledged that the grantee cannot hold a court; nor grant the land as copyhold again (*t*). And in the case of *Neale* and *Jackson* (*u*) the grant was only of a chattel interest; and, consequently, not within the statute of *quia emptores terrarum*. And, in the instance of the grant of the freehold and inheritance of *all* the

(*t*) 4 Co. 24. b. *Murrell & Smith*. 4 Co. 27. a.

(*u*) 4 Co. 26. b. *Cro. Eliz.* 395.

copyholds in the manor, the only case I can find (w) which countenances the doctrine, seems to have been denied by the justices on a writ of error being brought in the Exchequer Chamber: for, although the matter was compounded, the decision in B. R. was given up as insupportable; and the judgment declared to be "a strange judgment," never entered up by the direction of the court; and all the justices and barons in the Exchequer Chamber held clearly that the grant by copy, by the grantee of the freehold, was void (x).

[21]

Suspension of
a manor.

A manor may be suspended for a time and revive again: as where the lord leases all the demesnes of the manor for years; the manor, during the existence of the lease, is suspended; but, on the expiration of the term, it shall revive (y). So, if a manor descend to two parceners, and, on partition, the services be allotted to one, and the demesnes (z) to the other, and

(w) *Melwich & Luter*, 4 Co. 26. a.

(x) *Cro. Eliz.* 103-4. and 443.

(y) 1 *Leon.* 27-8. cited as so adjudged.

(z) *Trin.* 12 *Hen.* 4. pl. 13. f. 25. b. *Mich.* 18 *Hen.* 6. pl. 10. f. 26. a.

the one die, the manor shall revive; for it was suspended only, and not destroyed (a).

Our next inquiry is into the means of ^{Destruction of a manor.} destruction: and, in the first place, as a manor must consist of demesnes and services, we may observe that whenever they become absolutely separated, so as to be incapable of uniting again, the manor no longer continues a manor in reality (b), though it may in reputation; or, in other terms, it would cease to be a legal manor, though it may still be a seignior in gross (c).

(a) See 12 *Hen.* 4. and 18 *Hen.* 6. as before, and 6 *Co.* 64. a. 2 *Rol. Abr.* 122. *Manor* (F) pl. 3. and (H) where the same cases are cited.

(b) See 2 *Roll. Abr.* 122. *Manor* (H). *Littl. Rep.* 123. and the cases before cited from the Year-books; to which add *Trin.* 9 *Ed.* 4. pl. 17. f. 17. b. and 1 *And.* 257.

(c) See *F. N. B.* 3. C. [A man may have a manor in gross, (as the law termeth it,) that is, the right and interest of a court baron, with the perquisites thereunto belonging, and another or others have every foot of the land. *Kich.* 4. Certain minor prescriptive rights may also continue to belong to a manor, though rights of a higher nature, such as that of holding courts, &c. be gone and severed from it. 10 *East*, 259. *Seane v. Ireland et al.*]

If the lord grant all the demesnes (d), or all the services (e) to a stranger; or if all [22] the services become extinct; (f) the manor will be destroyed.

We have already seen that a court baron is essential to a manor at law; and that there must be frank tenants who owe suit: if all the frank tenancies, therefore, escheat, or become forfeited, or purchased by the lord, the manor is properly at an end (g), though it may continue, in contemplation of law, as to certain purposes; as to preserve the right of wrecks and estrays, &c. (h). So, if there be but one free tenant, the seignory as to him remains with respect to his services, &c. though there can be no court held (i).

(d) 6 Co. 63. a. *Sir Moyle Finch's case*.

(e) *Trin.* 9 *Ed.* 4. pl. 17. f. 17. b. and vide *Mick.* 17 *Ed.* 3. pl. 102. f. 72. b. and *Trin.* 12 *Hen.* 4. pl. 13. f. 25. b. and *Skin.* 661. in the case of *the King v. Bishop of Chester*.

(f) *Yelv.* 190. *The King v. Staverden*.

(g) *Bro. Comprise.* pl. 31. and ante. p. [9.] &c.

(h) *Calth.* 13. and vide *Trin.* 9 *Ed.* 4. pl. 17. f. 17. a. *Danby*. [Also 10 *East*, 259. *Some v. Ireland et al.*]

(i) 1 *Anders.* 257. 2 *Lord Raym.* 864. If all the free-tenancies escheat, the lord may nevertheless hold court, &c. for the copyholders. See 4 Co. 26 b. *Melwick & Luter*, and *Calth.* 13.

CHAP. II.

OF GRANTS.

[23]

IN the preceding chapter we have seen that the lord allotted certain portions of his demesnes to be cultivated by the lower order of his dependants, who held them at his will, under services of a base and rustic nature, and such, as in the conception of those days, it became the villein to return. Those allotments, like the ancient feuds, were properly the lord's gifts in recompense of acknowledged fidelity, and in consideration of future services.

We may therefore define a grant to be, “ a gift of the lord to another person of a certain portion of his demesnes, to be held by copy of Court Roll, at the will of the lord, according to the custom of the manor, under the usual services and returns.”

And, first, it is "a *gift*:"—and this the very term implies. Even feuds held by frank tenure were originally *gifts*: hence were they denominated *munera*, *beneficia*, and *feuda*; and the terms still used in feoffments are those of "give and grant;" *do* and *dedi* being regarded as the most apt and proper in that species of conveyance (*k*).

[24] And when we consider that copyholders were originally of so servile and base a class of men, and that they held their tenements strictly at will, we must necessarily regard those tenements as primarily derived from the munificence of the lord, as they continued to be even afterwards held at his pleasure.

Hence too, even at this day, a copyholder may, in pleading, allege any admittance, either upon a descent or surrender, as an immediate *grant* from the lord (*l*).

(*k*) See *Co. Lit.* 9. a. and *Watk.* No. II. to *Gilb. Ten.* 1. a.

(*l*) *Cro. Jac.* 103. *Pyster v. Hemling*, 4 *Co.* 22. b. *Brown's case*. [If, however, a person be admitted

Secondly, a copyhold “is the gift of the lord.” And here we may inquire into the capacity of the lord to grant. Who may grant.

In voluntary grants, says Sir Edward Coke, which are made by the lord himself, the law neither respects the quality of his person, nor the quantity of his estate: for be he an infant, and so through the tenderness of his age insufficient to dispose of any land at the common law ; or *non compos mentis*, an idiot, or a lunatic (*m*), and so for want of common reason unable to traffick in the world ; or an outlaw in any personal action, and so excluded from the protection of the law, or an

tenant upon a mistaken claim, under which it turns out that he has no title, he cannot recover in ejectment by virtue of such admission, as upon a new and substantive grant from the lord. See 7 *East*, 186. *Zouch v. Forse*. And per LORD ELLENBOROUGH, C. J. “an admittance to a copyhold does not in itself constitute a possession ; it only gives the party the means of possession if he have a good title to it.” *Ibid*. 192.]

(*m*) His committee cannot grant ; though, in *Blewit's* case, the court ordered that the steward should apprise the committee, and the court also, of his intention to grant by copy ; but this was a matter of discretion, and not of right. *Ley*. 47-8. and 6 *Vin*. 17. *Copyh*. (G.) pl. 15.

excommunicate, &c. yet he is capable enough to make a voluntary grant by copy.

[25] And the quantity of the lord's estate is no more respected than the quality of his person: for if his interest be lawful, be his estate never so great or never so little, it is not material: for be it in fee, or be it in tail, or dower*, or as tenant by curtesy, for life or for years, as guardian†, or as tenant by statute, or as tenant by *elegit*, or at will‡, the least of these estates is a sufficient warrant to the lord to grant§ any

A person having a particular interest only.

* Dower:—If a widow sue for her dower in one hundred messuages, &c. not naming the *manor*, she cannot grant, because she has no manor. *Gouldsb.* 37. pl. 11. *Brook's case*.

† *Owen*, 115. *Cro. Jac.* 98. Guardian taking Husband. See *Plowd.* 293. *Osborn v. Carden*.

‡ Tenant by Sufferance. *Owen*, 28-9.

§ But a *contract* or *agreement* to grant, shall not be carried into execution against the lord in remainder. 1 *Vern.* 472. *Awbry v. Keen*. [“ If tenant for life of a manor, having a power to grant, *covenant* to make such grant, that would in equity bind the remainderman; being in the nature of the execution of a power.” *Per* the LORD CHANCELLOR, in *St. Paul v. Ld. Dudley & Ward*, 15 *Kes. jun.* 167. So if a lord, tenant for life

copyhold escheated unto him, for as long time as the custom doth allow, the ancient rents and services being truly reserved; and these grants shall ever bind them that have the inheritance, or frank tenement of the manor (n). And the reason of the law is this: a copyholder upon voluntary grants made by copy, doth not derive his estate out of the lord's estate only, for then the copyholder's estate should cease when the lord's interest determines; *nam cessante primitivo, cessat derivativus*: but the life of the copyholder's estate is the custom of the manor; and, therefore, whatsoever befalls the lord's interest in his manor, be it determined by

of a manor with remainders over, purchase a copyhold interest, and take a surrender thereof to him and his heirs, such copyhold interest will merge, and, as parcel of the manor, be subject to the limitations thereof; but if the lord so purchasing, not being aware of the merger, *covenant* to surrender such copyhold interest by way of mortgage, a court of equity will compel a regrant by the remainder-man. *Ibid.*]

(n) But, it has been said, that a lord having a particular estate, cannot grant a copyhold by parcels, or demise part and retain the residue himself. *Per Popbam, Cro. Eliz. 662. in Gay v. Kay. Sed quære. See Co. Copyh. s. 41. Tr. 91. Cro. Eliz. 442.*

[26] the course of time, by death, by forfeiture, or other means, yet, if the lord were *legitimus dominus pro tempore*, how small soever his estate was, that is enough; for the same custom that fixes a copyholder instantly in his land upon his admittance, will likewise preserve and protect his interest to the end, in such manner that though the lord's interest fails, yet his shall never fall to the ground, being upheld by such a prop, such a pillar; unless perchance the copyholder offer violence to his founder, in breaking the custom (o).

A person seized in right of his church.

So a bishop, prebendary, parson, &c. seized in right of churches, may grant by copy in fee; if an estate in fee be warranted by the custom of the manor; and it shall bind their successors; and in the case of the bishop, such grant will be good even against the king on the vacancy of the see (p).

(o) *Co. Copyh.* s. 34. *Tr.* 67. &c. 4 *Co.* 23. b. *Clarke v. Pennyfather.*

(p) 4 *Co.* 21. b. in *Brown's* case, and the books cited, to which add *Trin.* 15 *Hen.* 7. pl. 13. fol. 10. a. 4 *Co.* 23. b. *Gilb. Ten.* 197.

So if a person be seized of a manor in right of his wife, he may, together with his wife, grant copyholds in fee, and it shall bind the wife and her heirs: but it is said, in the case of *Shopland* and *Ryoler* (q), that the husband cannot grant them in his own name; but the wife must join in the grant.

A person seized in right of his wife.

But if there be two joint tenants of a manor, one only may grant, and it will be good against his companion; for he was *dominus pro tempore*, and each was seized *per mie et per tout* (r).

Joint tenants.

If, therefore, a person have a lawful interest in the manor, at the time of the grant made, it is enough. The interest need not, we find, be any ways commensurate with the estate so granted by copy. Should the

Conditional or defeasible interest.

(q) *Cro. Jac.* 99. And note, on marriage, the freehold is in *both*. See *Post.* vol. 2. p. [152.] Sir Edward Coke, (*Compl. Co.* s. 34. Tr. 68.) speaking of husband and wife, seized in her right, says, "if *they both join in a grant*." So 4 *Co.* 23 b. Grant made by *Husb. and Wife*.

(r) See *Co. Copyh.* s. 34. Tr. p. 76. *Gilb. Ten.* 330. But see a *dictum* of Anderson *contra*, in 1 *Leon.* 234. 2 *Bl. Com.* 183.

[27] interest in the manor be determined the moment after the grant be made, nay, if it be wholly and *ab initio* defeated, it matters not, provided the interest of the granting lord was a lawful interest at the time of the grant.

Thus, if a manor be granted upon condition, and before the condition be broken, the land be granted by copy, and then the manor become forfeited, and the feoffor enter; yet the copyhold estate will remain untouched, because lawfully established by custom*. If a man seized of a manor in fee die seized, having issue a daughter, and, his wife being *privement ensient* with a son, the daughter grant lands by copy; this grant shall stand good against the son, for the daughter was *legitima domina pro tempore*. So, if the feoffee of a manor upon condition to infeoff a stranger the next day, make a voluntary grant by copy, this shall bind: and yet his interest was to have but small continuance. If a manor be granted with a feme in frank marriage, and there be a divorce had, *causa præcontractus*, so that now the interest of the manor is granted to the feme only, and by

* Owen, 28.

relation the marriage is void *ab initio*; yet, because the baron was *legitimus dominus pro tempore*, any copyholder's estates granted before the divorce will remain good. So, if a man espouse a feme seignioress under the age of consent, and after she disagree; though the marriage by relation was void *ab initio*, yet copyholds granted before disagreement shall never be avoided; *causa qua supra*.

If the lord of a manor commit felony or murder, and process of out-lawry be awarded against him, and after the exigent he grant copyhold estates, according to the custom, and then be attainted, these grants are valid, though by relation the manor was forfeited from the time of the exigent awarded. So, if the lord had been attainted by verdict or confession, any grant by copy after the felony or murder committed, shall stand good, notwithstanding the relation. If the lord of a manor acknowledge a statute, and then grant lands by copy, and after the manor be delivered to the cognisee in extent, the grant cannot by this be impeached (s).

Lord committing felony.

[28]

(s) *Co. Copyh.* s. 34. and post. [45.]

Dowress.

If the lord, after marriage, grant by copy and die, and his widow be endowed, yet the grants will be good against her: but if the heir, after the death of the husband and before endowment grant, it should seem that the widow may, on being endowed, avoid such grants of the heir (t).

A person having an unlawful interest.

But no grant can be good if made by a person having only a tortious or unlawful interest, as a disseisor, abater, or intruder, or even by the heir or feoffee of such disseisor, &c. or the discontinuee of a tenant in tail; or by a tenant by sufferance, as if a person seised *pur auter vie* of a manor grant by copy, after the death of *cestuy que vie*: in all these cases the grants would not be [29] available against the persons having right (u).

Grants by the steward.

It is not, however, necessary, where the interest is lawful, that the lord should grant

(t) *Co. Copyh.* s. 34. *Tr.* p. 71. N. (6) to *Co. Lit.* 58. b. cites *Rous* and *Artois*.

(u) *Co. Copyh.* s. 34. *Co. Lit.* 58. b. 1 *Roll. Abr.* 499. *Copyhold* (C) pl. 2. *Rous* and *Artois*. 2 *Leon.* 45. S. C. *Gilb. Ten.* 198. &c.

in his own person. A steward, retained by patent in the case of the king (*w*), or even by word only in the case of the subject (*x*), may grant according to the custom of the manor, without the express direction or assent of his lord (*y*): though not in opposition to his positive commands (*z*).

But, in order to enable the steward to *grant*, it is not enough that he be steward *de facto*, he must have a lawful authority. In matters of necessity, indeed, or in which the person is merely an instrument, as in admittances on surrenders, the acts of a steward *de facto*, of only a reputed or ostensible authority, will be good; as the person taking under such act is not obligated to examine into his authority, and the person acting does that only which the lord himself would be compellable to do (*a*).

(*w*) 4 Co. 30. a. *Harris and Jay. Gilb. Ten.* 321.

But see stat. 1 Ann. st. 1. c. 7. sect. 5.

(*x*) Co. Copyh. s. 45. Tr. p. 104.

(*y*) *Harris and Jay, ubi sup. Gilb. Ten.* 321.

(*z*) Cro. Eliz. 699. *Harris and Jay.* Trustees may appoint a steward, 21 Vin. 512. Trust (Q.) pl. 1.

(*a*) *Gilb. Ten.* 315. Cro. Eliz. 699.

Under steward,
&c.

[30]

So, an under or deputy steward may grant (b); and even such deputy may substitute or appoint another to do so (c). But, in case of the king, it is said that the steward must be expressly empowered by his patent to appoint a deputy, or the grant by such deputy will not be good (d).

Bailiff.

The bailiff of a manor cannot, as such, make a grant by copy; for such a power does not appertain to his office, which was instituted for other purposes (e).

Grant out of
court.

And we may here remark that the lord or steward may grant as well out of court as in; and it should seem, as a necessary consequence, out of the manor also: but it is said, that an under steward cannot grant out of court without a special authority or custom enabling him so to do. Yet *quære* as to this latter point (f).

(b) See *Moore*, 112. *Bro. Ten.* p. *Copie*, pl. 26.

(c) See 1 *Leon.* 288. Lord *Dacre's* case; and see also 1 *Lord Raym.* 658.

(d) 4 *Co.* 30. a. b. *Harris* and *Jay*.

(e) *Gilb. Ten.* 204. *Cro. Jac.* 99. and *Owen*, 115.

(f) See *Watk.* No. cxi. to *Gilb. Ten.* 447. *How-*

Thirdly, it is the gift of the lord “*to another person.*” For the lord cannot grant to himself; nor can he hold of himself by copy: *nemo potest esse tenens et dominus*, was the established axiom of the distant day.

To whom a grant may be made.

The lord himself cannot be a grantee.

Lord Coke, indeed, tells us, that the lord himself may take a copyhold to his own use (g); but it is evident that he was then speaking of the lord's taking a *surrender* to his own use; for although the professed object of his chapter in which the cited passage is to be found, is to point out who may be *grantees*, yet in truth the greater part of that chapter is confined to the capacity of the *surrenderee*.

[31]

So, the lord cannot grant to his own wife; Nor his wife. for she is not another person in the eye of

ever, even admitting that an under steward has no authority in himself to make a grant, yet it should seem that any act of the lord, (he being apprized of such grant,) acknowledging the grantee as a tenant, would be a confirmation of such grant, or at least preclude the lord from rescinding or annulling it.

(g) *Co. Copyh.* s. 35. *Tr.* p. 79.

the law: the husband and wife being but one person in legal estimation (*h*).

Nor a corporation.

Again; it should seem that the grant ought to be confined to a *person*; for it does not appear that a *corporation* can hold by copy. So the king cannot be a copyholder; not only in his corporate, but in his natural capacity; for it is below his majesty, says the law, to perform servile services (*i*): but, indeed, according to a doctrine long established, he cannot perform any services at all, since he can hold of none (*k*).

Nor an alien.

In Calthorpe (*l*) it is said that an alien may be a copyholder; but this, I conceive, is under the idea that a copyholder is strictly a tenant at *will*, which an alien may

(*h*) 2 *Wils.* 254. *Firebrass d. Symes v. Pennant.*

(*i*) 2 *Siderf.* 82. in *Field v. Boothsby*. [And see *infra*, p. 340-1.]

(*k*) *Co. Lit.* 1. b. *Dyer*, 2. b. pl. 8. in marg. and 154. b. pl. 18. Yet there are many instances of kings holding lands of a subject in ancient days. See 1 *Rob. Scotl.* 8. and *N. Stuart Diss. Antiq. Engl. Constit.* p. 3. a. 3. p. 160. N. (6.)

(*l*) p. 52.

be; but as a copyholder has ceased to be merely such, it is clear that an alien cannot hold by copy (m).

But, with respect to other persons, we may observe, generally, that those who are under no disability to take by grant at common law, are capable of taking by copy according to the custom of the manor (n). [32]

Fourthly, it is “ a gift of the lord, &c. of a certain portion of his demesnes.” What may be granted.

Nothing can be granted by copy which is Parcel of the manor.

(m) See *Dyer*, 2. b. in marg. 303. a. in margin, and *Alleyne's Rep.* 14: *Rex v. Holland*. Trust for an alien, see *Com. Dig.* Alien (c. 3.)

(n) *Co. Copyh.* s. 35. [Q^u. Whether an attainted felon, discharged by warrant under the sign manual, with a promise of pardon, but who does not appear to have received any regular pardon, be capable of taking a surrender and holding by copy; as also whether a lord be compellable to admit a surrenderee so circumstanced, or after having by admittance accepted him as a tenant, without being aware of any grounds of exception, be precluded from objecting to him at any future time? See 15 *East*, 463. *The King v. the Inhabitants of Haddenham*.]

not parcel of the manor (o). The copyholder held originally only at will; and the possession of the tenant at will was that of the lord. The tenements, therefore, which were held by copy were still considered as in the hands of the lord, and, consequently, as his demesnes (p).

Must lie in
tenure.

Again; nothing can, by the very terms, be granted to be held by copy, which does not lie in tenure; for what lies not in tenure cannot be *held*, as rents, bailiwicks, fairs, commons, and advowsons in gross, &c. (q).

Manor.

A manor, it is said, may be granted by copy; though this has been much ques-

(o) Co. Lit. 58. b. 4. Co. 92. b. 24. b. See *Watk. Gilb. Ten.* 313. And see *ante*, ch. 1. p. [19.]

(p) 2 *Roll. Rep.* 236. *Cro. Jac.* 559. *Pymmock v. Hilder*, 12 *Mod.* 147. *Winter v. Lovedurr*, 1 *Lord Raym.* 43, 4. *Brittel v. Bade*, and 1225. *Crowth v. Oldfield*, 1 *Salk.* 185. *Brittel v. Dade*.

(q) Co. Copyh. s. 42. Co. Lit. 58. b. See *Robins. Gav.* b. 1. c. 5. p. 79.

tioned (r). In the *Year-Book*. M. 32 Hen. VI. pl. 16. fol. 9. b. it is affirmed that one manor may be parcel and held of another. But it may be asked, is not every manor that is not absolutely held in *capite* held of another manor? And, therefore, its being *held of another* does not seem conclusive as to the validity of a grant by copy. But as to the assertion that one manor may be *parcel* of another, we cannot help observing that such a doctrine appears subject to much objection; the manor held by copy, is held *at the will* of the lord above.

[33]

If, by length of time, indeed, such will is become nominal only, it can make no difference in the nature of the thing: it was originally strictly at will. Now the conception of one tenant at will demising *a manor* to another at will, seems rather extraordinary; as the tenants at the will of the latter would be subject to a double caprice (s). However, several manors in the kingdom

(r) *Co. Lit.* 58. b. and N. (2.) and see *Cro. Jac.* 259. *The King v. Stanton*, *Gilb. Ten.* 215, 11 *Co.* 17. a. Sir Henry Neville's case.

(s) And see *Cro. Jac.* 260. *The King v. Stanton*.

are said to be so held (t); and as it is not probable that any more should be so granted, the subject must be suffered to rest.

Tithes.
Underwood,
&c.

Tithes, it is said, may be granted by copy (u); and underwood (w), herbage, &c. (x).

(t) *Cro. Jac.* 327. *Moore v. Goodgame.* 11 Co. 17. a. S. C. under the name of *Sir Henry Nevil's*. And see *Year-Book M.* 32 *Hen.* 6. pl. 16. f. 9. b.

Aylesham in *Norfolk* is held by copy. See *Compl. Copyh. tit. Aylesham*, &c.

(u) See *Watk. Gilb. Ten.* 331. and n. (k).

(w) 4 Co. 31. a. *Hoe v. Taylor* [*Cro. Eliz.* 413. S. C.] and *Gilb. Ten.* 332. and *Watk.* No. clxxvi.

(x) See *Co. Copyh.* s. 42. *Viner. Copyh.* (E.) *Comyns. Copyh.* (C. 1.) [Without the soil. *Co. Lit.* 58. b. So one may hold the *prima tonsura* or "fore crop" of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. And ancient admissions of the copyholder, and those under whom he claims the land, by the description of *tres acras prati*, may be construed to carry only the *prima tonsura*, if in fact they have enjoyed no more under such admissions, whilst another has had the after crop, and has cut the trees and fences, repaired the latter, scoured the ditches, and kept the drains, although the copyholder may have paid all rates and taxes. 7 *East*, 200. *Stammers v. Dixon.*]

But it is alleged that it is necessary, in order to support a grant by copy, that the thing granted must have been demised and demisable from time whereof the memory of man is not to the contrary; hence, say they, a ^{Waste-lands.} grant of waste land by copy, which was ne- [34] ver granted by copy before, would not be good (y).

Yet, if lands have been granted by copy for a number of years, as 60 or 80, and it cannot be shewn that they were not demisable before that time, the law will presume that they were regularly granted; and consider them as proper copyholds. But in this case, as Calthorpe says, it is not the number of years, but the memory of man,

(y) 1 *Leon.* 55. *Kemp and Carter.* 3 *Keble.* 124. *Bishop of London v. Rowe,* *Kitch.* 81. b. 2 *Wils.* 125. *Rowe d. Newman v. Newman,* 2 *Durnf. and East,* 415. *Revell v. Jodrell,* and see Lord Hale's note (a). to *F. N. B.* 14 *D.* which cites 21 *Ed.* 3. 56. Vide 21 *Ed.* 3. f. 56. a. *Mich.* pl. 5. But those grants would be binding as to the lord who granted. See *Sheppard's Court-Keeper's Guide*, 121-2. where is a *quare* how such grant ought to be pleaded; whether as a grant by copy, or as a lease parol.

on which their nature as copyhold depends. Such a number of years would create a presumption; but if it can be shewn that they were once not demisable, then such presumption must give place to proof (z).

But we are told by Sir Edward Coke (a), that it is not of necessity that the lands must always have been actually *demised* time out of mind, by copy of court roll; if they were *demisable*, said he, it is sufficient. If this then be law, what reason can be given why a grant by copy of waste lands should not be good, if sufficient commonage be left for the other tenants? It is acknowledged that if a copyhold escheat, and the lord keep it ever so many years in his hands, he may again grant it by copy; and such grant will be good (b). Now, on the escheat, the former grant was utterly at an end; and, if the lord may make a new grant (for a new grant

[35]

(z) *Calth.* 19. 54-55. and *Watk. N.* xc. to *Gilb. Ten.* 435. Note, 50 or 60 years sufficient to establish a copyhold. See 3 *Leon.* 107. *Taverner v. Cromwell.*

(a) *Co. Litt.* 58. b.

(b) *Co. Litt.* 58. b. 4 *Co.* 31. a. *French's case.*

it certainly would be) of the premises, why should he not grant any other part of his demesnes by copy?

The land formerly granted by copy was originally demesne land, equally with any other part of the waste (c). The grant of waste-land cannot interfere with the statute of *quia emptores terrarum* (d), for it is not within it; the copyholder holding only at will, and taking no estate at common law;—no portion of the tenancy.

In many manors in England a custom is urged as enabling the lord to grant portions of his waste-lands by copy, *with the assent of the homage* or of a certain number of them. And in the case of *Hughes v. Games* (e), such a custom was admitted to

(c) 2 *Roll. Rep.* 236. per *Ley*, C. J. and see *ante*, p. [32.]

(d) 18 *Ed. 1. West.* 3.

(e) *Select Cases in Chanc. Temp. King.* c. 62. *Hughes v. Games.* In this case it was admitted that a lord, by custom, may make new grants of part of the manor to hold by copy; and a case was cited to that purpose. LORD CHANCELLOR:—In the case cited, such

be good; and a case was also cited in which it was said to be so determined; and Lord Chancellor King there seems to have acknowledged the validity of such a custom (*f*), but said that the question in the case of *Hughes v. Games* was, whether there was a custom to do it *without* the homage? and that, said his lordship, must go to law; and

grants were made with consent of the homage; the question here is, whether there be a custom to do it without the homage? And that must go to law, and then it will be by them considered how far a custom to make such grants without the homage be a good custom. It was said Lord Chief Justice Pemberton had a copy in this manor. See also *Cas. Temp. Finch.* 263. *Lady Wentworth et al. v. Clay et al.* But note, it does not appear from the report of the case, that the ground to be set out by the homage, was to be granted to be held *by copy*; but it is said that the lady might, after such allowance by the homage, "grant leases and estates thereof at her pleasure, to be enclosed and kept in severalty, &c."

(*f*) And the author has been informed, that in a case which came on in the Common Pleas, *De Grey C. J.* intimated an opinion that such a custom might be good; but the case went off on another ground. The custom was alleged as within the manor of Hampstead in Middlesex. See 5 *Durnf. and East*, 417. in not. *Folkard v. Hemmet et al.*

then it will be for the court of law to consider how far a custom to make such grants *without* the homage be a good custom *. [36]

The consent of the homage seems to have been necessary for the preservation of their commonage, &c. but it should not be forgotten that the frank-tenants might have a right of commonage in the lord's waste also. The homage of copyholders, therefore, (for frank-tenants are not of the homage in the copyhold court) cannot bind the right of the tenants who hold not by copy. The consent of the homage does not seem, therefore, a sufficient ground on which to rest.

The transcendant power, indeed, of par-

* See 3 *Bos. & Puller*, 346. *Lord Northwick v. Stanway*. [Where it was held, that if there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, premises granted in that way are well described as copyhold premises, though the date of the grant be modern, and are to be considered as much copyhold tenements as if they had been immemorially holden by copy of court roll.] And note,—Custom for the *Lord* to grant: it does not notice any assent of the homage.

liament may enable a person to grant by copy (*g*), and such power has been repeatedly conferred (*h*); but then such power, so specifically given, seems to imply that the grants would not be otherwise good.

Lands escheated, &c.

How the demisable property may be destroyed.

[37]

By whatever means the lord accedes to the copyhold interest, whether in consequence of escheat, forfeiture, descent, surrender, or otherwise (*i*): or however the copyholder takes the *manor* (*k*); yet, as lord, he may regrant the premises by copy; unless he change the nature of the estate by creating a common law interest in the lands. If he make a lease for years or any other estate by deed *, the demisable property of

(*g*) See 2 *Durnf. & East*, 415. in the case of *Revell v. Jodrell*.

(*h*) 35 *Hen.* 8. c. 13. 37 *Hen.* 8. c. 2. and 22 and 23 *Car.* 2. c. 3. relative to *Thornbury* in *Gloucestershire*, &c.

(*i*) 1 *Roll. Abr.* 498. *Copyh.* (B). 4 *Co.* 31. a. *French's* case.

(*k*) See *French's* case, *ubi sup.* &c.

* Or without deed, 4 *Co.* 31. a. *Cro. Car.* 521. 1 *Roll. Abr.* 498. *Copyhold.* (B). pl. 3. Lease for any time *certain* destroys the custom. See 1 *Roll. Abr.* 498. *Copy.* (B). pl. 3. and my *Princ. of Convey.* p. 10.

the premises would be for ever destroyed: but if he retain them for any length of time * in his hands, he may grant them by copy again. Or if a copyhold in fee escheat to the lord, and he grant it to another by copy for life, he may grant the reversion also

* *Cro. Elis.* 699. *Harris v. Jays.* 4 *Co.* 31. a. *French's case.* *Co. Copyh.* a. 62. *Tr.* 141. *Quare.* It is said if the lord lease the copyhold for a year or for half a year, &c. by deed, or even by *parol*, the demisable property is destroyed; because it would be, during that time, severed from the manor. (See *Cro. Car.* 521.) Yet, is not the possession of the lessee the possession of the lord; and, consequently, may not the copyhold be still said to be in his demesne? But it should be remembered that the interest of the lessee is a common-law interest, and not a copyhold interest: yet it is said if the lord lease at will (*Co. Copyh.* a. 62. *Tr.* 141. 3 *Leon.* 108.) it will not destroy the demisable quality, though an estate at will is a common-law and not a copyhold interest. Besides, it does not appear how the leasing the copyhold for a year can be a severance from the manor. It is not like a grant in fee. When the copyholder leases by licence, it is no severance. It should therefore seem, that the reason is, that while the term (whether it be for several years, or for half a year) continues, the premises are not demisable, but that when they are only granted at will they are demisable, as the lord may determine his will at any time.

by copy; or grant a new copy on the death of the tenant for life (l).

So, if the interruption be wrongful, as if the lord be disseised, and the disseisor disseised, or if the land be recovered against the lord by false verdict, or erroneous judgment; in these cases, till the land be recovered or the judgment reversed by the lord of the manor, the land will not be demised or demisable; and yet, after the land be continued, it will be grantable again by copy; for *non valet impedimentum quod de jure non sortitur effectum, et quod contra legem fit pro infecto habetur*: but if the land so forfeited or escheated before any new grant made be extended upon a statute or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower have this land assigned to her, although these impediments are by acts in law, yet, inasmuch as the interruptions are lawful, the lands can never after be granted by copy (m).

(l) 1 Leon. 56. *Kemp and Carter*.

(m) 3 Co. 31. a. 4 *French's case*.

But if a copyhold escheat, and the lord *pro tempore*, who has only a particular interest in the manor, make a lease for years or other common law estate which would have absolutely destroyed the demisable property of the lands, had such lease or estate been made by a tenant in fee, yet such lord, having only the particular interest in the manor, shall not, by his own act, prejudice him in remainder or reversion: and therefore, although he himself shall be bound by his own act, and absolutely precluded from granting the premises again by copy, yet, on the determination of his estate in the manor, the premises may be granted by copy again: for the custom shall not be destroyed, as to those in remainder (n). So, if the king lease an escheated copyhold by deed, the custom shall not be destroyed; but, on the expiration of the lease, he may again grant it by copy: for the grant of the

(n) *Cro. Eliz.* 459. *Conesbie v. Ruskey.* 2 *Roll. Abr.* 271. *Prescript* (T.) pl. 1-4. S. C. under the name of *Rusley* and *Conesby.* 2 *ibid.* 196-7. *Prerogative le Roy* (G) pl. 3, 4. *Cremor and Burnett*, and n. (7) to *Co. Litt.* 58. b.

king shall not enure to a double intent as the grant of a subject may do (o).

Who may re-
grant such es-
cheated lands.

And as to the grant of lands which were once held by copy and escheated to the lord, we may observe that it matters not whether they escheated before the accession of the granting lord to the manor, or within his own time; for immediately on their escheating they fell into the manor and passed along with it, and, consequently, might have been granted again by copy (in case their demisable property was not destroyed by their being turned into common law estates) by any lord who acceded to the manor, however trifling his interest, provided his interest were lawful (p).

Again, if a copyholder accede to the manor, and his copyhold be, in consequence, extinguished, he may grant it again by

(o) *Cremer and Burnett, ubi sup.* and *Gilb. Ten.* 304.

(p) See *Sir Wm. Jones*, 449. *Les and Boothby*. 1 *Keb.* 720. *S. C. Cro. Car.* 521. *S. C.* 4 *Co.* 31. b. *French's case*.

copy (*q*) equally as the lord originally entitled to the manor might have done in case the copyhold had escheated or been surrendered to his use: for it matters not whether the manor come to the copyholder, or the copyhold come to the lord.

If the lord have only a particular interest in the manor, he may grant by copy, though the estate so granted by him may not only continue longer than his own estate in the manor, but even if the estate so granted may eventually not come into possession during the existence of his own estate: thus, a tenant for life (*r*), in dower (*s*), or guardian (*t*), and seemingly by the better authority as well as from the reason of the thing, a lessee for years (*u*), may so grant in reversion, though the grant may not take effect

(*q*) *Moore*, 185. pl. 330. *Hide and Lyon*. 4 Co. 31. b. S. C. *Hut*. 65. *Blemmerhasset v. Humberston*. Sir *W. Jones*, 41. S. C.

(*r*) *Calk*. 99.

(*s*) *Cro. Eliz.* 661. *Gay and Kay*.

(*t*) 2 *Roll. Abr.* 41. *Gardien*, (2) pl. 3. *Shapland and Ridler*. 2 *P. Wms.* 122.

(*u*) See *Gilb. Ten.* 204.

in possession till their own interest be determined.

Grant in reversion.

[40] But it has been said, that a lord cannot grant a copyhold in reversion without a special custom empowering him so to do: yet it is observable that most, if not all, the books which assert this doctrine are evidently, and for the most part avowedly, founded upon the loose note in *March* (w), and the case mentioned in *Leonard* (x) and *Godbolt* (y). The first of which does not appear to be any more than a *dictum*; and so Chief Baron Comyns (z) considered it; and in the latter the justices would give no opinion on the point. And the case of *Plimpton v. Dobynet*, in *Gouldsborough* (a) is also inconclusive, though it seems to be against the validity of such custom. A custom to restrict the lord, who might have granted a copyhold in possession in fee, appears, as

(w) *March. Rep. Temp. Car.* 6. pl. 13.

(x) 3 *Leon.* 226. pl. 13.

(y) *Godb.* 140. pl. 171.

(z) *Comyns's Dig. Copyh.* (C. 12.)

(a) *Gouldsb.* 102. pl. 8.

Chief Baron Gilbert observes (*b*), to be very unreasonable. If, indeed, the custom goes only to restrain the particular tenant from granting in reversion it might, as he remarks, be reasonable enough. But we must certainly have a better authority than that in *March*, before we affirm that even a lord having a particular interest, would require a custom to *enable* him to make such a grant, though a custom to *restrict* him might possibly be good.

Fifthly, the premises granted must be held "*by copy of court roll*;" for this is an essential in this species of tenure. It is not enough to allege that certain premises are held "according to the custom of the manor," but they must be expressly shewn to be held, "by copy of court roll also" (*c*):

The premises granted must be held "by copy of court roll."

[41]

(*b*) *Ten.* 322.

(*c*) 3 *Bulstrode*, 280. *Elkin and Wastell*. *Calthorpe* says, "If the lord in open court doth grant copyhold land, and the steward make no entry thereof in the court rolls, this is not good, though it be never so publicly done, and no collateral proof can make it good.

But if the tenant have no copy made unto him out

and on the other hand it is not enough to affirm that they are held "by copy of court roll," without shewing also that they are held "at the will of the lord" (d); for otherwise they may be only customary freeholds*.

of the roll, or if he lose his copy, yet the roll is still a sufficient title for his copyhold, and even if the roll be also lost; yet it seems that by proof he can make this good. *Calth.* 47, 8. [And see 16 *East*, 208. *Doe d. Bennington v. Hall.*]

(d) *Cro. Car.* 229. *Hughes v. Harrys.* *Carth.* 432. *Gale v. Noble.* *Co. Copyh.* s. 32. *Tr.* p. 58. *Blackst. Tracts*, Consid. on Copyholders, and 2 *Com.* 149. ch. 9. And see 7 *East*, 409. *Brown v. Rawlins.*

* [See however, as to this, 7 *East*, 299. *Doe d. Cook v. Danvers*, where it was held, that the *freehold* of an estate, parcel of a manor, and demisable only by the license of the lord, passing by surrender and admittance, and to which the tenant was admitted by the description of a customary *ténement*, *habendum* to her and her heirs, *tenendum* of the lord, by the rod, according to the custom of the manor, by the accustomed rent, suit of court, and other services, is in the *lord*, and not in the tenant, though *not holden at the will of the lord*: and that such an estate may well pass under the description of copyhold in a *will*, or even instructions for a will, without attestation or signature, provided that neither be required by the terms of the surrender to the use of the will. See also, *ibid.* 409. *Brown v. Rawlins.*]

And it is observed by Lord Coke (e), that there is no tenant in the law that holds by copy: but only this kind of customary tenant; for the man, says he, holds by copy of a charter, or by copy of a fine; but this tenant holds by copy of court roll.

Sixthly, they are to be held "at the will of the lord, according to the custom of the manor." Under the preceding branch of our definition, we have noticed the necessity of alleging that the copyholder holds "at the will of the lord." The copyholder was, originally, strictly and merely a tenant at will. He was solely indebted to the munificence of his lord for his lands; and his lord might have resumed them at pleasure. While the tenant, however, conducted himself faithfully, and fulfilled his conditions and returns, he was suffered to continue in the possession of the estate. If indeed he failed in these, his interest, of consequence, became forfeited to the lord.

—"at the will of the lord, according to the custom of the manor."

Of the estate of the copyholder.

When the tenant died, his children, de- And progress of copyholds.

(e) Co. Lit. 57. b. Co. Copyh. s. 32. Tr. p. 57.

[42] pendent upon their industry in rustic employments for support, and bred up under the protection and in the interest of their lord, were often permitted to retain the spot which their father had cultivated; and succeeded on the conditions under which he had held them. This seemed reasonable and just. It was conceived hard to deprive the children of a faithful vassal, of the scanty pittance they might reap from succeeding him. This became, therefore, frequently practised; and in many manors, this ripened into custom. The common law, always friendly to freedom, countenanced every measure which favoured it, and which tended to make the tenant less dependent on his lord. The conditions on which the vassal held his copyhold, became in time fixed in their nature, though perhaps not always so in their duration and extent; and it thence became usual to grant such an interest to the tenant and his heirs, yet subject to the right of resumption by the lord. The tenant, notwithstanding such descendible estate, was still, therefore, said to hold at the lord's will; and his heir was necessitated to be regularly admitted to the tenancy. He acknowledged the gift, and

was grateful for the renewed munificence of the lord. He accepted the seisin and paid his fine. Should the lord, indeed, have required an exorbitant fine, the heir would have been disinherited; but this the law at length prevented, and confined his demands within the limits of justice, and regulated them by the value of the lands to which the heir ought of right to succeed. As the tenant held only at will, at least in the consideration of law, he could not transfer his interest to another; at the most, he could [43] only relinquish his own right to the premises. He therefore returned them to his lord. When a copyholder wished to transfer his estate, he communicated those wishes to the lord, who often complied with his request, and accepted his resignation under confidence to regrant the estate to the person he was desirous should succeed him (f). This also becoming more frequent, and the connection every day relaxing between the

(f) In early times freeholds were frequently so transferred. Vide *Mad. Form. Angl.* No. C. *Mad. Bar. Anglica.* b. 3. c. 4. p. 230. *Dalrymp. F. P.* c. 6. s. 1. p. 232. *Fitzh. Abr. Prescript.* pl. 29.

lord and his tenant, the returns and duties becoming more fixed and certain, and the advantages of alienation perpetually presenting themselves, the law countenanced the usage, and often enforced its compliance. Still, however, a regular resignation or surrender, by the old tenant, and a regular acceptance or admission of the new were requisite. And this form must to this day be adhered to (g).

Thus has the law supported and strengthened the estate of the tenant, though it still regards him as holding at the will of the lord. But the tenant has long ceased to be subject to his caprice. The grant indeed by the lord is solely dependent on his option. The lord cannot be compelled to grant (h);

(g) *Watk.* No. lxvi. to *Gilb. Ten.* p. 407-9.

(h) *Moore*, 788. *Lord Grey's case.* *Watk.* No. lxxx. to *Gilb. Ten.* 413.

But a custom for a tenant for life to name his successor is good, for this is a *quasi fee*. 1 *Roll. Abr.* 560. *Customes* (E.) pl. 18. and (H.) pl. 1. *Rawles* and *Mason*. 2 *Brownl.* 85. 192. S. C. *Noy's Rep.* 3. S. C. cited. 1 *Roll. Rep.* 48. *Crabb* and *Bevis*, cited. *Noy*. 3. S. C. and see *Noy*. 2. 4 *Leon.* 238. *Ball's*

for this were to deprive him of the ownership of his property. The lord can be no more obliged to grant a portion of his demesnes to another, than to convey the manor itself to a stranger. He may do either if he pleases; but he is not compellable to grant at all. [44]

If, however, he chooses to grant a portion of his demesnes to a person to be held by copy, his election is made. From the very time of the grant, and in consequence of the very act, the copyholder ceases to be a mere tenant at the will of his lord: he is no longer subject to his caprice. The lord has granted him his estate, and the law has established it. The absolute control of the lord has fled, and the tenant is in by the custom. Hence he is no longer said to hold merely "at the will of the lord," but "at the will of the lord according to the cus-

The copyholder is in by the custom.

case. *Preced. Chanc. 3. Devenish v. Baines*, and see 2 *Durnf. & East*, 746. *Mardiner v. Elliott*. See *post.* ch. 7. of Fines. *Coke, C. J.* thought that a copyholder could not nominate part to one and part to another. See 2 *Brownl.* 199.

tom of the manor." But though the copyholder's interest is thus established, he is still considered, as to many purposes, as a tenant at will; though that will be circumscribed and controlled by the custom. The freehold of the premises remains in the

[45] lord (i); and the possession of the copyholder is regarded as the lord's possession, and shall, consequently, cause a *possessio fratris* in him (k). While, however, the tenant renders his services and does no act which may amount to a forfeiture of his tenancy, he cannot be deprived by the lord of his interest in the lands. The lord cannot rescind his estate; he cannot determine his will: and if the tenant has a transmissible interest, he is compellable to admit the heir or other person entitled by law. Should the lord presume to remove him from his lands, or even to enter on them, the tenant may have his action of tres-

(i) *Litt. s. 81. And see 3 Burr. 1273. Stephenson v. Hill.*

(k) *Watk. on Desc. c. 1. s. 1. p. 51.*

pass (l); or even indict him (m); according to the measure of his offence*.

(l) See *Co. Lit.* 60. b. & st. 21 *Jac.* c. 15.

(m) See *Gilb. Ten.* 329.

* [Neither can the lord dig in the copyholder's land, for the great prejudice that he would do to the copyholder's estate. *Gilb. Ten.* 327. and see 1 *Roll. Abr.* 106. *Sir Wm. Jones*, 243. *Player v. Roberts*, and 1 *P. Wms.* 408. And in *Bourne v. Taylor*, 10 *East*, 189, it was accordingly held, that the lord of a manor, as such, has no right, without a special custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and that the copyholder may maintain trespass against him for so doing. Hence it should seem that the lord of a manor may be in the same situation with respect to mines as with respect to trees; that is, the property may be in him, but at the same time he cannot enter and take it without consent; which must be acquired by purchase or otherwise. See 17 *Ves. Jun.* 282. And if a person attempts, or even threatens to break up mines having no right so to do, that is a reason for coming into Chancery to have an injunction. *Per* the LORD CHANCELLOR, in *Gibson v. Smith*, *Pasch.* 1741. *Barnard. Chanc. Rep.* 497. And accordingly, in *Grey v. the Duke of Northumberland*, an injunction was granted against a lord preparing to open a mine. 13 *Ves. Jun.* 236. But a distinction was recognized between opening a mine and working one already opened:

Immediately on the grant being made, the tenant is in by the custom. Hence the estate of the lord need not be commensurate with that of the tenant; the former is not merely derived from the latter. Hence a tenant at will of the manor may grant a copyhold to a stranger in fee (n). The copyholder shall be in by the custom, and paramount the interest of the granting lord. Hence the estate so granted to be held by copy shall not be subject to his charges or incumbrances (o).

And his estate shall not be subject to the lord's charges.

and such injunction will not be continued beyond a reasonable time for bringing the matter to trial. 17 *Ibid.* 281. And, with regard to the opening and working of mines by the lord of a manor, it has further been held, that a custom for him and his tenants sinking pits for collieries in the freehold lands to lay and continue the rubbish, materials, &c. on the lands of the customary tenants near the pits, is void, as being unreasonable and arbitrary, and tending to defeat the copyholder of the whole profits of his land, and to destroy his estate. See 2 *Strs.* 1924. and 1 *Wils.* 63. *Wilkes v. Broadbent*. With respect to the lord's power as to trees, see *Gilb. Ten.* 238. and seq. *Watk. Ed.* and the authorities there cited, and *infra* p. 332.]

(n) 4 Co. 23. b. 6 Co. 60. b.

(o) See 8 Co. 63. *Swayne's case*.

If a copyhold escheat, and the lord grant a rent-charge or acknowledge a statute, and then regrant the copyhold, the rent or statute will not affect the copyhold; but the tenant shall be in paramount the charge (*p*). [46]
 If, indeed, the manor had been actually extended on the statute, the lands would be bound (*q*); but in that case they would be no longer grantable by copy.

The copyholder, therefore, being in by the custom, shall not be prejudiced by the acts of the lord. If the lord, therefore, convey the freehold of the lands so held by copy to a stranger (*r*), or lease them to a stranger for years (*s*), the copyhold shall not be extinguished. If, indeed, the lessee assign over to the copyholder, his copyhold interest would be destroyed; but then this would be in consequence of *his own* —nor prejudiced by his acts.

(*p*) See *Gillb. Ten.* 202. and *Watk.* No. lxxxvi. p. 430.

(*q*) *Co. Copyh.* s. 62. *Tr.* 141. See *Saville*, 71. pl. 148.

(*r*) 4 *Co.* 24. b. *Murrel* and *Smith*, &c.

(*s*) 2 *Co.* 16. b. *Lane's case.* 2 *Leon.* 209. *Beal* and *Langley.* 4 *Leon.* 230. S. C.

act (t), and not immediately in consequence of the act of his lord.

The next thing to be remarked, with respect to "the custom of the manor," is, the estate which such custom prescribes.

What estate
may be grant-
ed.

[47] When a copyhold escheats, the lord is, as we have already observed, under no obligation to regrant it by copy : he may keep it himself ; or absolutely destroy its demisable properties, by turning the premises into frank-fee. Yet if he chooses to grant it again by copy, his control over it is no more during the existence of the grant. On the grant being made, the custom of the manor immediately takes effect, and prescribes its extent with respect to the estate of the tenant. The lord cannot exceed the limits prescribed by the custom ; he may grant for a less, but he cannot grant for a greater estate (*u*). If the custom warrants him to grant in fee-simple, he may grant any other estate, since all others are included in a fee (*w*) ; he may grant to a person

(*t*) *Lane's case, ubi sup.*

(*u*) See *Co. Copyh.* s. 41. *Tr.* p. 90.

(*w*) 4 *Co.* 23. s. *Bullock and Dibley. Co. Lit.* 52. b.

and the heirs of his body, with remainders over (x). If the custom authorizes him to grant for three lives, he may grant for one; or to one for the lives of three (y); or he may grant for years (z). If he may grant an absolute estate, he may grant a conditional one*. If the custom be to grant in fee, "*and not otherwise*," a less estate may be equally granted, though a less estate was never granted before; for the words, "*and not otherwise*," would be of no avail; such a restrictive clause would not be good (b).

(x) See *Bullock and Dibley, ubi sup. Cro. Eliz. 373. Stanton and Barnes. Watk. No. lxxix. Gilb. Ten. 425-7. post. ch. 4.*

(y) 2 *Ld. Raym.* 994. *Smartle and Penhallow*. The words *et non aliter* must be meant only of the extent of the custom, and not that the lord is confined to the formality of a grant for three lives only. Custom to grant for one life; grant to two jointly not good. *Per Fenner and Popham, obiter, in Gravener v. Brook et al. Poph. 35. and see Lord Raym. 997. Arg. (sed quare.)*

(z) 4 *Co.* 23. a. *Co. Lit.* 52. b.

* *Cro. Eliz.* 323. *Downs v. Hopkins.* 4 *Co.* 29. b.

(b) *Stanton and Barnes, ubi sup. 2 Lord Raym.* 994. *Smartle and Penhallows.*

So the lord may grant in remainder or reversion, though he have only a particular interest in the manor (c).

[48]

The usual services and returns must be reserved.

Seventhly, the copyhold must be granted "*under the usual services and returns.*"

It was said, by *Ley*, C. J. in the case of *Smith v. Reynard* (d), that when copyhold lands come into the hands of the lord by escheat or forfeiture, the lord may grant those lands by copy rendering (or reserving) a greater rent. But Sir Edward Coke lays it down in express terms (e), that the most trivial variation must not be made from the ancient services, else the heir may avoid the grant; nay, if the ancient rent were expressly reserved in gold, and, on the new grant, it be reserved in silver, it would be fatal; or if two copyholds escheat, the one usually demised at twenty shillings rent, and the other at ten, and the lord grant them

(c) *Ante*, p. 39. Though it has been said that such a lord cannot grant in parcels. See *ante*, p. 25. n. (n).

(d) 2 *Roll. Rep.* 236.

(e) *Co. Copyh.* s. 41. and see *Cro. Eliz.* 699. 700. *Harris and Jay*, and *post.* ch. 6. p. 281-2.

both, rendering thirty shillings, it would not be good. And this doctrine of Lord Coke's is adopted in its fullest extent by Mr. Justice Blackstone (*f*); and also by the late Chief Baron Gilbert (*g*), who reasons that as there is nothing but custom to warrant the grant by copy, so it ought to be strictly pursued as to the estates, customs, services, and tenure, else it is not the estate that was demised before; and though he conceived that if there were a copyhold in fee, the lord might release part of the services and not do any prejudice to the copyholders estate,* (for there would then be an estate in being which would appear to have been the old estate,) yet, when the [49] lord grants a new estate by copy, since it is an estate against common right and warranted only by custom, such custom must be strictly pursued in order to bind the heir.

(*f*) 2 *Comm.* 370. ch. 22.

(*g*) *Ten.* 198.

* See *Hil. 7 Edw. 4.* 25. a. pl. 32. If the lord release his seignory in part of the tenancy, all the seignory by his own act is gone. See 6 *Co.* 1. b.

Form of a Grant.

If the grant be out of court let a memorandum be thus made:—

Manor of Fairhurst. } BE IT REMEMBERED that on this, the day of in the year of our Lord, &c. I, M. Earl of B. lord of the manor of *Fairhurst* aforesaid, HAVE granted unto C. D. of &c. and his heirs ALL that messuage &c. situate, &c. and within, and parcel of, the said manor, which were heretofore in the possession of A. B. and held by him of the same manor by copy of court roll, &c. and on his decease escheated for want of heirs; AND that I have also given unto the said C. D. *seisin* thereof by the rod; TO HOLD to him, the said C. D. and his heirs, by copy of court roll, at the will of the lord, according, &c. by the same rents, customs, and services, as the same messuage, &c. have been heretofore held. AND that the said C. D. gave for a fine 100*l.* but his fealty was respited.

If in court, say,—

ALSO AT THIS COURT the lord of the said manor, by his said steward, granted unto C. D. ALL, &c. AND the said C. D. being present in court in his proper person, prayed seisin of the said, &c. **WHEREUPON** the lord by his said steward granted seisin thereof by the rod, &c.

CHAP. III.

OF SURRENDERS.

[50] **A** COPYHOLDER being in consideration of
Nature of. law but a tenant at will, he had no interest
which he could transfer to another; he could
only relinquish his own right to the pre-
mises. When he was, therefore, desirous
that another should succeed him in the te-
nancy, he surrendered or returned the pos-
session to the lord, under confidence that he
would regrant the premises to the person he
himself should designate*. If the lord

* *Bract*. lib. 4. *Tr.* 1. c. 28. s. 5. fol. 209. a. Trew, weiver cel et dit que l'usage fuit tiel, et que les frank tẽr poief vendrẽ lour terres, et quant ilz vendrẽ &c. *ils vienã en court et rendã al oeps cesty que serra fessfee, et les bailes ferra exec.* &c. *Fitzh. Abr. Prescript.* pl. 29. cites *P.* 13 *Ed.* 3. Note. These frank-tenants

accepted such resignation under such confidence the Court of Chancery enforced the trust. This power, thus assumed by the courts of Equity, seems coeval with the introduction of uses with respect to freeholds. Though seemingly new in the time of Edward the Fourth, it was generally acquiesced in, as it opened the way for the alienation of copyhold as well as of freehold estates; and the connection between the lord and tenant every day relaxing, and the returns and duties becoming more certain and fixed, the law countenanced the usage (*h*).

Before the statute of *quia emptores terrarum* this was an usual mode of conveying freehold estates. Many instances remain of their being so transferred, even through the medium of the king (*i*). [51]

were stated to hold in *villeinage*; *i. e.* their *persons* were *free*, but their tenure was *base*. See *ante*, p. 7. The word *feoffee* shews that the custom of *enfeoffing* was usual at that time, (13 *Ed.* 3.)

(*h*) See *Watk. Gilb. Ten.* 408. No. lxvi. 410. No. lxix. and 2 *Bl. Comm.* 366. ch. 22.

(*i*) *Mad. Bar. Angl.* b. 3. c. 4. p. 230. (*b*). *Mad. Form. Angl.* No. c. *Watk.* No. lxvi. to *Gilb. Ten.* 408. and see *Dalrymp. F. P.* ch. 6. s. 1. and *ante*, ch. 2. p. [43.]

Copyholds being still considered in law as estates at will, they can only be thus transferred. A surrender or resignation must be made by the tenant to the lord, and a new grant must be made to the person who wishes to succeed him (*k*).

This mode, indeed, is now considered as a form (*l*); but even as a form, it is, generally speaking, indispensable. A copyhold cannot properly be transferred by any other assurance; no feoffment or grant will have that operation. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each others use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender it to the use of my last will and testament; and in my will I must declare my intentions, and name a devisee who will then be entitled to admission (*m*).

Id 55 Geo. 3 c 192

The power of alienation in the copy-

(*k*) *Watk. Gilb. Ten.* No. lxvi. and lxix. 4 Co. 22. a.

(*l*) See *Watk. Gilb. Ten.* No. lxx.

(*m*) 2 *Bl. Comm.* 367. ch. 22.

holder is now, however, so established, that the lord is compellable, not only by *sub-pena* in equity, but by *mandamus* at law, [52] to admit the person nominated by the former tenant (n).

The manner in which a copyhold is sur- How made.
rendered, is this: the tenant, either in person or by attorney, yields or returns the seisin or possession of the premises to the lord, or his steward, or to certain tenants, according as the custom is, by re-delivering or returning the symbol of seisin by which he was admitted (o), as a relinquishment of the premises as to himself; and, if it be not intended for the immediate benefit of the lord, at the same time designating the person who is to be instituted into the tenancy. It is thus entered on the roll:

(n) [The lord cannot help receiving the surrender. Per the LORD CHANCELLOR, in *Williams v. Ld. Lonsdale*, 3 Ves. Jun. 752. and vide *infr.* p. 93. and chap. 6. Of Admission.]

(o) *Post.* ch. 6. Of Admission.

Entry of in
the roll.

[53]

“ At this court came I. S. one of the copyhold or customary tenants of this manor, and surrendered into the hands of the lord by the rod,” (or other customary symbol, as the usage may be,) “ and acceptance of the said steward, according to the custom of the said manor, all that copyhold messuage, &c. now in the occupation of, &c. and of which he the said I. S. at the time of making the surrender, was seized in fee (*p*), at the will of the lord, according to the custom of this manor; [and all other his copyhold or customary tenements whatsoever, holden of the manor

(*p*) Though a surrender passes only that estate which the copyholder has in himself and may lawfully pass, yet, if the uses to which the surrender is made, are more extensive than such estate, and the lord admits the surrenderee according to the uses declared, the admittance may operate as a new grant. [*Vid. supr.* p. 24.] It is, therefore, advisable to express the estate which the surrenderor has in the premises in order to prevent an imposition or error. For should the expressed estate not be commensurate with the uses declared, the matter would be apparent.

See *Watk. Gibb. Ten.* 255. 257. 451-3. No. cxix. cxx. 4 *Leon.* 88. *Ca.* 186. 1 *Freem.* 246.

aforesaid:] and all his estate, right, title, interest, use, trust, benefit, claim, and demand (q) of, in, to, or out of, the same or any part thereof, *to the use and behoof of, &c.*

A surrender, therefore, may be thus defined: “the yielding up of an estate by the tenant to the lord; either as a relinquishment or resignation of such estate, or as the mean of conveying or transferring it to another.” Defined.

First then, it is “*the yielding up of an estate.*”

(q) It is often proper to insert the words “all the estate, right, &c.” as they may operate *as a grant or release of the right*, when the tenant has, in reality, only a right to or an equity in the premises. See 2 *Vern.* 16. *Spindlar* and *Wilford*, and *post.* p. 61. But q⁷. of this, as it is neither under seal nor stamped. And a right or equity of any kind should, *at law*, be released by *deed*. And though a court of equity might deem *signing* sufficient, yet may it not be subject to a stamp duty? See *post.* as to the surrender of a rent, and q⁷. whether *Spindlar v. Wilford* was not on surrenders which were made before the Statute of Frauds? But note, that interests in copyhold property are excepted in the stat. sect. 3. But *trusts* must be granted or assigned by writing. S. 9.

What shall
amount to a
surrender.

This must be apparent from what has been already observed; but we shall here inquire into what the law considers as amounting to the yielding up, or surrendering of a copyhold: and such yielding up or surrendering of a copyhold may be either by express words or by implication of law.

[54] Sir Edward Coke affirms that the word *surrender* is *vocabulum artis*; and therefore, where a surrender is needful, if this one word be wanting, all other words used in ordinary conveyances, says he, are ineffectual and insufficient to convey any copyhold estate; for if a copyholder come into court, and offer to pass his copyhold by word of grant, of gift, of bargain and sale, or such like, I doubt he will fail of his purpose: for as he is tied to a singular form of assurance, so is he restrained to peculiar words in his assurance (r).

Yet he tells us, in the same section, that a surrender (where, by a subsequent admission, the grant is to receive its perfection

(r) *Copyh.* s. 39.

and confirmation) is rather a manifesting of the grantor's intention, than the passing away any interest in the possession. And it should seem, from other books, that any words manifesting such intention will operate as a surrender, provided it be not prejudicial to the rights of third persons (s).

There is indeed, much obscurity, and seemingly, inconsistency in the books with respect to this subject; though there are several distinctions laid down which seem to have been relied on, that should not here be forgotten. When the lands are to pass for the lord's immediate benefit, "a small matter will suffice to throw them into his hands (t);" but the law will be more strict, and insist more strongly on the compliance with form, where the surrender, if well made, will be the mean of conveyance to a stranger; and, lastly, it will not dispense with a particle of the form, where it is to operate to the destruction of a third person's right. [55]

(s) *Gillb. Ten.* 252. 311. *Sir Thomas Jones's Rep.* 142. *Zinzon v. Talmash.*
 (t) 2 *Show. Rep.* 191. *Zinzon v. Talmash.*

As to the first and second cases, it has been held, that if the copyholder use the words "*bargain and sell*" instead of "surrender" it will be sufficient to *extinguish* his copyhold for the benefit of the lord (u); but that those words will not operate as a surrender so as to benefit a stranger; for in that case the heir of the copyholder may avoid it (w).

When the interest of third persons is affected, the surrenderee is, with more propriety, restricted to the prescribed terms. Thus on a grant for lives *successive*, with a custom for the first taker to destroy the whole estate by surrendering into the lord's hands; if the first taker join with the lord *in levying a fine* of the lands to the use of others, the fine shall not operate as a surrender so as to satisfy the custom and defeat the limitations over to the other lives (x).

(u) *Hutton*, 65 *Blemmerhasset v. Humberstone*.
Sir *W. Jones's Rep.* 41. S. C.

(w) *Calth.* 57. See *Co. Copyh. ubi sup.*

(x) 2 *Show. Rep.* 130. *Zinzon v. Talmash*. Sir *T. Jones*, 142. S. C. 1 *Freem.* 263. S. C.

In instances, however, where the rights of other persons are not prejudiced, it should seem the better opinion, as well by the greater number of cases as the reason of the thing, that any words expressive of the intention of the copyholder to return the copyhold into the lord's hands for the purpose of its being conveyed to a stranger, will be a sufficient surrender in law.

Calthorpe says, that if a copyholder come [56] into court and tell the lord that, for the preferment of his son in marriage, his will is to give his land presently to his son, and desire the lord to be contented therewith, and the same be recorded or found by the homage as a surrender, and so presented, it would be a good surrender, without other words (y). So, if in court he desire the lord to admit his son to be tenant in his father's place, he says, this seems a good surrender to the son (z).

If a copyholder come into court and say

(y) *Readings*, 59.

(z) *Calth.* 57, 8.

that he "is weary of his copyhold," and request the lord to take it (a); or if he *resigns* his interest, in court, into the lord's hands, to do therewith his will (b); it will be a good surrender; but in these cases the surrender operates as an *extinguishment*.

But it is said that if a copyholder *renounces* his copyhold (c), or declares that he will be no longer the lord's tenant (d), though the words be recorded, it will be no surrender.

But surely if the word surrender be not *vocabulum artis*, be not absolutely, in any instance, indispensable, there cannot be an instance in which it would be less wanted than in these. Is not the copyhold in [57] these cases solemnly *resigned*, relinquished, and abandoned? and is it not said, with respect to extinguishment, that "a small matter suffices to throw it into the lord's hands"? And Chief Baron Gilbert infers, that, as a copyholder is only a tenant. at

(a) *Hutt.* 65.

(b) *Calth.* 58.

(c) 1 *Roll. Abr.* 502. (L.) pl. 2. See *Kitch.* 124. b.

(d) *Calth.* 58. See *Kitch.* 124. b.

will, any thing amounting to a determination of that will, on the part of the copyholder, will be sufficient to extinguish his copyhold (e).

Yet words spoken by a copyholder must be expressive of an actual and immediate relinquishment of the premises to amount to a surrender, for if he only says he is *content* to surrender, or the like, he only expresses an intention of doing so at some future time: which will not be a surrender in law (f).

So, if a copyholder *covenant* to surrender (g); though the covenant be presented by the homage (h).

But we may here observe that those words which, if spoken in court would amount to a surrender, will amount to a surrender when spoken out of court before a person

(e) *Gilb. Ten.* 301.

(f) *Calth.* 58. *Gilb. Ten.* 252.

(g) See 2 *Show.* 131. *Zinson v. Talmash.*

(h) 2 *Durnf. & East*, 484. *The King v. The Lord of the Manor of Hendon.*

who is authorised to take a surrender out of court: but words spoken before indifferent persons, or in common conversation, or in anger, &c. cannot amount to a surrender of copyholds (*i*).

[58]
Surrender by
implication. That a copyhold may be surrendered by implication, is now indisputably established, however it was doubted in former times.

If a copyholder in fee comes into court and accepts a new copy, to himself for life, remainder to his wife for life, remainder to his son for life, this is tantamount to, or implies a surrender to the use of himself for life, &c. But the reversion continues in him (*k*): for, had an actual surrender been made, no more would have passed than would have satisfied the uses declared (*l*); and no further surrender shall be implied than is requisite to give effect to the new uses or estates.

What may be
surrendered.

Secondly, a surrender “ is the yielding up

(*i*) See *Gilb. Ten.* 273-4. and *Watk.* No. cxv. p. 450.

(*k*) *Gilb. Ten.* p. 254.

(*l*) See *Watk.* No. cxvi. to *Gilb. Ten.* p. 450.

of an estate." Nothing can, properly, be the subject of a surrender but a legal interest. A surrender is the relinquishment of the *tenancy*; or at least the returning of that portion of the seisin which rests in the person who is about to surrender.

But it is not necessary that such person have an estate in *possession*; it is enough if it be in *remainder* or *reversion*; for the persons in remainder or reversion are equally in the seisin of the fee (*m*). A remainder or reversion, therefore, is equally the subject of a surrender*.

If a copyholder in fee surrender for a less estate †, as to A. for life, he may enter on the determination of A's estate; as he con-

A reversion
or remainder.

[59]

Reversioner
being in of
his old seisin.

(m) See *Butl. Addit. Notes to Co. Litt.* 266. b. N. (1).

* [And a devise of either consequently requires a surrender to the use of the will. See 12 *Ves. Jun.* 426, *Church v. Mundy*, and vide *infra*, p. 210.] *Vid 55 Geo 3 c 192*

† Copyholder may surrender part of his interest. *Cro. Eliz.* 442. *Fitch v. Hockley*; or part of the lands. *Vin. Copyh.* 42. (A. a.) pl. 3.

Or remainder
man on ad-
mission of the
particular ten-
nant,

may surren-
der;

but not the
surrenderee
of a rever-
sion, &c. be-
fore his own
admission.

Heir of rever-
sioner, &c.

tinues in of his old seisin (*n*): if a copyhold be limited to one person, with remainders over to others, the admission of the particular tenant gives seisin or admission also to the remainder men (*o*): the reversioner or remainder man, therefore, being in the seisin, may surrender that reversion or remainder to another, without a personal admittance to themselves (*p*).

But the surrenderee of a reversion or remainder cannot properly surrender before his own admission; for before such admission he is not in the seisin; having never been accepted as a tenant (*q*).

The heir of a reversioner or remainder-

(*n*) 9 Co. 107. *a.* and see *post.* ch. 6. of Admission, and ch. 7. of Fines.

(*o*) See *post.* ch. 6. Of Admission.

(*p*) *Crō. Eliz.* 504. *Gyppen v. Bunney.* *Ibid.* 662. *Colchin v. Colchin.* 3 *Leon.* 239. *Butler & Lightfoot.* 4 *Ibid.* 9. S. C. and 4 *Ibid.* 111. *Hegger v. Felston.* Q^y. whether the remainder man must not satisfy the lord for his fine, as the heir must do on surrendering before admission?

(*q*) See *post.* p. 60.

man may, indeed, surrender before his own admittance, on satisfying the lord for his fine (*r*); but this is no more than an heir of a person who was actually possessed might have done (*s*). As the heir, in each of the three instances, has a legal interest in the premises, the actual admittance is only for the security of the lord's fine; if that fine be satisfied it is enough; the admission of the heir, is not essential to establish *the heir's* title so as to enable him to surrender. But this is only a *dispensation* of the admission; and not that strictly the heir is tenant, or possessed of an estate which is the proper object of a surrender, independently of such admission. [60]

Where a person, therefore, is not in the seisin, he cannot properly surrender. If he has only an equity, or right, or authority, or in short, any claim which lies not in tenure (*t*), he must pass it by another mode

What cannot
be surren-
dered.

(*r*) *Cro. Eliz.* 504. *Gyppen v. Bunney*. But *q^r*. whether the case of *Gyppen v. Bunney* warrants this? *Sed vide post.* 245.

(*s*) 4 *Co.* 92. *b.* and *post. ch.* 9.

(*t*) *A fortiori*, if the person has no claim at all; as an heir in the life of his ancestor; for a surrender shall

of conveyance. The person having the legal possession, is the tenant to the lord; and how frequently soever such right, equity, &c. be transferred, the *tenancy* will remain unaffected.

An equitable
interest;

An equitable interest in copyholds, therefore, may be assigned or devised without a surrender (*u*).

An authority
or power.

So, if an authority or power be given to a person, he may exercise it; and the vendee or appointee shall be in by the original instrument without a new surrender to his use (*w*).

Surrenderee
cannot sur-
render before
admission.

So, if a surrender be made to the use of a

not operate as an estoppel. See 3 *Durnf. and East.* 365. *Goodtitle v. Morse*, and 6 *Ibid.* 63. *Doe d. Ibbott v. Cowling & Ux.* 1 *Anstruther*, 11. *Morse v. Faulkner & al.*

(*u*) 1 *Atk.* 388. *Hawkins v. Leigh & al.* *Ibid.* 389. *Macey & al. v. Shurmer.* 2 *Ibid.* 38. *Tuffnell v. Page.* 3 *Ibid.* 73. *Car v. Ellison.* 1 *Ves.* 121. *Allen v. Poulton,* *Ibid.* 490. *Gibson v. Lord Montfort.* and see 1 *Hen. Blackst.* 461. *Roe v. Lowe.*

(*w*) 2 *Wils.* 400. *Holder d. Suhyard v. Preston.* *Cro. Jac.* 199. *Beal & Shepherd.*

a stranger, that stranger cannot before his own admittance surrender to the use of another*. The surrenderor continues tenant to the lord. If indeed the lord accept the surrender of the *cestui que trust*, it may be an implied admission on the first surrender (x). [61]

If a copyholder surrender to another on condition, who is thereupon admitted, he may release the condition by deed (y); for the tenancy is already full. Release of condition.

So, one joint tenant may release to his companion (z); or he may surrender to him, as the surrender is through the intervention of the lord, and so not like the surrender of a joint tenant of freehold. But by such surrender the joint tenancy is severed, and Release by joint tenants.

* [So a surrender to the use of his will, made by a surrenderee before admission, is absolutely void and of no effect; and cannot be rendered valid by his subsequent admittance. 11 *East*, 246. *Doe d. Tofield v. Tofield*. See also 16 *ibid.* 210. et vid. *infra*, p. [86.] [100.] et seq.]

(x) See *Gilb. Ten.* 275, 281. &c. and *Watk.* No. lxxv. p. 163. and cxxx. p. 457. and *post.* p. [101.]

(y) *Cro. Jac.* 36. *Hull* and *Shar-brook*.

(z) *Co. Lit.* 59. a. N. (2).

the surrenderee shall not be in on the original grant, but by his companion (a).

Release of
right.

If a person be wrongfully admitted, he who has the right may release it (b); but such right is not the subject of a surrender. If, indeed, the person having right "surrenders" it, such his act, though it will not operate as a surrender, may operate as a release, and so be sufficient to pass it (c).

A person entering by
wrong cannot
surrender;

There cannot properly be a disseisin of a copyholder; for the freehold is in the lord: if any one, therefore, enter "with strong hand" into a copyhold, he does not usurp the

(a) *Kitch.* 86. a. Co. Copyh. s. 36. p. 79.

(b) 4 Co. 25. b. *Kite* and *Quienton's* case. A person wrongfully admitted (and having the possession,) is a disseisor of the person having right. See 1 *Burr.* 108. But see 3 *Leon.* 210. C. 274.

(c) 2 *Show. Rep.* 82. *Stone* and *Exton*, and *ante*, [59.] (q). [A court of law will not *presume* a release of right from the heir, during the existence of a legal estate by which he was precluded from setting up his claim, (as a tenancy by the curtesy, or the like,) or within twenty years after its determination: but he may, in equity, be called on to discover whether such release were ever executed by him. See 10 *East*, 583: *Doe d. Milner v. Brightwen.*]

seisin; nor, consequently, become a *tenant* *. He cannot, therefore, surrender (*d*). The person having right continues tenant to the lord: and *he* may enter and surrender the estate †. So, if he die, his heir may enter and surrender (*e*). but the person having the right may do so. [62]

So, if the lord seize the copyhold wrongfully and grant it to another, and he be accordingly admitted; the rightful copyholder may surrender on his entry (*f*); or he may release his right, as before observed (*g*): So he may enter on a person wrongfully admitted, and surrender

* The *disseisee* continues tenant (see *post.* v. 2. p. [146.]) and must be answerable for the services. The writ *de consuetudinibus & servitiis*, lay against the frank-tenant who was disseised. See *Kielw.* 20. b. *pl.* 4. And the disseisee must have his action over against the disseisor.

(*d*) 2 *Mod.* 32. *Keen v. Kirby.*

† *Yelverton*, 81. *Nowell's case.* See 21 *Jac.* c. 15. and *Co. Lit.* 257. b. N. 1. and *Clayton*, p. 1. [Entry not tolled by descent. See 7 *East*, 299. *Doe d. Cook & Ur. v. Danvers.*]

(*e*) *Cro. Jac.* 36. *Joyner and Lambert.*

(*f*) For on his entry he would be in of his former seisin. See *Co. Copyh.* s. 56. *Tr.* 129.

(*g*) See before, p. [61.] (*b*). But this is in case he does *not* enter; for his entry would destroy the privity, by taking the possession out of the person wrongfully admitted.

though he cannot release to a disseisor, as the disseisor is not tenant to the lord (h).

A rent cannot properly be surrendered.

A rent cannot properly be held by copy (*i*), nor, consequently, be properly surrendered (*k*), except as incident to the reversion (*l*): but an act purporting to be a surrender may operate so far as to pass it in equity, as a grant, or evidence of an agreement for its sale (*m*).

Who may surrender.

Thirdly, a surrender "is the yielding up of an estate by the *tenant*." And here we may inquire, *by whom* such surrender may be made?

Who not.

Every person having such an *estate* as may be the subject of a surrender, must be presumed capable of making such surrender; and therefore, if they are not, it must be

(h) 1 *Leon.* 102. *Wakeford's case*.

(i) See *Co. Copyh.* s. 42. *Tr.* 97. *Calth.* 54. *Gilb. Ten.* 331.

(k) 2 *Vern.* 16. *Spindlar v. Wilford & al.*

(l) See 1 *Leon.* 315. *Austin and Smith*.

(m) *Austin and Smith. Spindlar and Wilford*, as before.

from a *personal* incapacity; as by being under age, covert or the like.

And *first*, as to the surrender of an infant; [63]
the act of an infant shall not prejudice him: Surrender by an infant;
if therefore, he make a surrender, he may enter at full age without suit; though the surrenderee be admitted (n).

But an infant may be ordered by the court of Chancery to surrender a copyhold which he has as a trustee or mortgagee (o). So the committee of a lunatic may surrender the copyholds of such lunatic, under the direction of the court, by the equity of the statute, 4 Geo. 2. c. 10. by order of chancery.

Secondly, as to *femes covert*.

Femes covert.

Husband and wife may, together, surrender the wife's lands; she being on such sur- Husband and wife.

(n) *Moore*, 597. *Gooles v. Grane*. *Popham*, 39.
1 *Leon*. 95. *Knight and Footman*.

(o) See 7 *Durnf. and East*, 103. *Doe d. Harman & Ux. v. Morgan*: and see also 2 *Chanc. Rep.* 392. *Nayler v. Strode*.

Examination
of wife.

render, examined apart by the steward (*p*), though such steward be only by parol; and that without any special custom to warrant it (*q*). So the steward may depute another to take such surrender and to examine the feme covert (*r*). So her examination may be taken on a surrender out of court by two tenants, if there be a special custom, but not otherwise (*s*).

Wife alone.

[64]

As the husband becomes, on marriage, entitled to the profits of the wife's copyholds, during her life, and often, by custom, during his own, it would be unreasonable that the wife should be suffered to deprive him of them by force of a particular custom without his consent: it has therefore been determined, that a custom for a feme covert to

(*p*) *Gilb. Ten.* 277. and see 1 *Hen. Blackst.* 334. *Compton v. Collinson*. And it should seem, that by special custom, such surrender would be good, though the feme covert be an infant. See 1 *Hen. Blackst.* 345.

(*q*) *Cro. Jac.* 526. *Smithson v. Cage*.

(*r*) 1 *Leon.* 289. *Burgess and Foster. Cro. Eliz.* 48. *Burdett's case*.

(*s*) *Cro. Eliz.* 717. *Erish and Rives*. [And see 4 *Taunt.* 294. *Driver d. Berry v. Thompson*.]

surrender without such consent cannot be supported (t). Not without assent of husband.

But where a copyhold is settled on a wife for her own separate use, it does not fall within the reasons of the last case; and therefore, she may surrender it without her husband (u). Separate estate.

And where the wife is *not* entitled to her separate use, yet a surrender of her copyhold, by herself alone, *with* the consent of her husband, would be good (w).

And if the husband be present at such What shall be an assent of the husband.

(t) 2 *Wils.* 1. *Stevens* and *Wise v. Tyrrell*.

(u) See 2 *Bro. Chan. Cas.* 377. *Compton v. Collinson*, and 1 *Hen. Blackst.* 341. 351. S. C. [So if a copyhold be surrendered to such uses as a feme covert shall by will or codicil appoint, a paper purporting to be a will, though made by her, living her husband, is a good execution. 4 *Taunt.* 294. *Driver d. Berry v. Thompson*.]

(w) See 3 *Leon.* 81. *Skipwith's case*. 4 *Ibid.* 148. S. C. *Godb.* 14. 143. S. C. 2 *Brownl.* 218. *Moore*, 123. *Ca.* 268. See *Bro. Devise.* 34. *Co. Copyh.* 2. 35. *Tr.* 79. 1 *Ves.* 229. *Taylor v. Phillips*. *Ambl.* 628. *George v. —*. 2 *Brow. Ch. Ca.* 377. *Compton v. Collinson*, and 1 *Hen. Blackst.* S. C.

surrender it will be sufficient proof of his assent (x). So, if the husband and wife agree to live separate, and the husband thereupon covenants that the wife shall therefore enjoy to her own use her real estates, &c. after such covenant her surrender shall be taken to be with his assent; and by custom such a surrender is good, as appears in *Moore*, 123. [ca. 268.] (y).

[65] If a feme sole surrender to the use of her will, and afterwards marry; the marriage will be a revocation, or at least a suspension, of the surrender (z).

Marriage, a
revocation of
a surrender to
a will by a
feme sole.

Surrender by
husband no
discontinu-
ance of wife's
estate. If a husband surrender the copyhold of his wife, it will not be a discontinuance; a surrender only passing what he has a right to convey: it only binds during his own life: on his decease his widow or her heir may enter (a).

(x) 1 *Ves.* 229. *Taylor v. Phillips*.

(y) 2 *Bro. Ch. Ca.* 377. and *387. p. *Buller*, Commissioner, and see 1 *Hen. Blackst. S. C.*

(z) *Ambler*, 627. *George v. ———*.

(a) 4 *Leon.* 88. *Ca.* 186. 4 *Co.* 23. a. *Gilb. Ten.* 189, &c.

And it may be here observed that an husband may surrender his own estate to the use of his wife (*b*); or the wife, where the custom authorizes her to surrender, to that of her husband (*c*): for the conveyance is through the intervention of the lord. But an husband cannot without such intervention convey to his wife, or the wife to the husband, they being but one person in law; and therefore, the lord cannot grant a copyhold to his own wife (*d*).

Husband may surrender to the use of his wife, & *e contra*.

But the lord cannot grant to his own wife.

So, one joint tenant may surrender to the use of his companion (*e*).

A joint-tenant may surrender to his companion.

But when any one is authorized to surrender his copyhold, it is not always necessary that he should do it in person: he may appoint, in many cases, an attorney for the purpose.

Surrender by attorney.

Where the copyholder is not under any personal incapacity, as *non compos*, covert,

(*b*) 4 Co. 29. *b. Co. Copyh.* s. 35. *Gilb. Ten.* 220.

(*c*) See last page.

(*d*) 2 Wils. 254. *Firebrass d. Symes v. Pennant.*

(*e*) *Ante*, p. [61.]

[66] or an infant, and possesses a power which may be delegated to another, a surrender which is warranted by the general law of copyholds may be by attorney, as well as in *propria persona*.

Who cannot make attorney, with respect to the person.

In the first place, then, the person must not be under personal disability, as before remarked; for a person *non compos*, under coverture, or an infant, cannot make an attorney by the common law (*f*), nor can they be enabled by custom.

Femescovert.

In some cases, indeed, an attorney may be appointed by the husband for himself and his wife; but that cannot be done in the present instance. The wife must, on her surrender, be separately examined by the steward, to prevent the coercion of the husband; this, therefore, would be frustrated by his appointment of an attorney: for a person cannot be examined by deputy.

(*f*) The *stat. 9 Geo. 1.* only enables *femes covert* and infants to make attorney for the purpose of admission. It has nothing to do with surrenders.

But a feme covert, or infant, may be an attorney for another; for they would act only as instruments and ministerially (g).

But a feme covert, &c. may be an attorney.

Secondly, The person who would make an attorney must have such a power to assign as may be so executed; for *delegatus non potest delegare*.

Who cannot make attornies, with respect to the estate.

And, therefore, where executors or other persons are empowered to sell the copyhold of their testator, they cannot surrender by attorney; for, in fact, they are no more than attornies themselves (h).

Again, a surrender which may be made by attorney must be such as, if made by the copyholder himself, would be warranted by the general law of copyholds.

[67]

A person cannot surrender by attorney, where he cannot surrender in person without a special custom. And therefore, though

Thus, a copyholder may surrender in court (i), or into the hands of the lord (k) or

(g) See *Co. Litt.* 52. a.

(h) *Co. Copyh.* s. 34. 9 *Co.* 75. b.

(i) 9 *Co.* 75. b. *Combes's case*.

(k) *Co. Litt.* 59. a. 1 *Salk.* 184. *Dudfield v. Andrews*.

he may surrender by attorney in court, or to the lord or steward out of it.

the steward (*l*) out of court (*m*) ; without a special custom to do so. He, therefore, may surrender in court (*n*), or to the lord (*o*) or steward (*p*) out of it, by attorney. For

(*l*) 1 *Salk.* 184. *Dudfield v. Andrews.* 1 *Lord Raym.* 76. *Tukely v. Hawkins.*

(*m*) In 2 *Ves.* 680. in the case of *Mitchell v. Neale*, it is said, that "a surrender by attorney cannot be out of court." But this, if understood generally, is contrary to unquestionable authority.

(*n*) 9 *Co.* 75. *b.*

(*o*) *Gilb. Ten.* 251. 2.

(*p*) It often happens, that a case the most obvious and likely to occur has either not received an absolute decision, or that decision has not been regularly reported ; hence a direct reference is sometimes impracticable. The present point, however, that a copyholder may surrender by attorney, into the hands of the steward, out of court, without a special custom, may be proved syllogistically, thus,—In cases where a copyholder may surrender by the general custom of the realm, he may surrender by attorney. *Combes's case*, 9 *Co.* 75. *b.* A copyholder may surrender, by the general custom, to the steward out of court. *Dudfield v. Andrews*, 1 *Salk.* 184. *Tukely v. Hawkins.* 1 *Lord Raym.* 76. Therefore a copyholder may surrender by attorney, into the hands of the steward out of court, by the general custom of the realm.

where he may surrender by the general custom of the realm, which is the common law, it follows that he may do it by attorney, as a thing incident by the common law (*q*). [68]

But where it is necessary to allege a special custom to enable a copyholder to surrender in person, there he cannot surrender by attorney; as to surrender into the hands of two tenants (*r*), or into the hands of the bailiff or reeve of the manor (*s*): for in these cases a special custom would be necessary to warrant the surrender of the copyholder himself, and, therefore, a surrender by attorney would not be good without a further custom for doing so.

He cannot surrender to two tenants, or the bailiff, &c. without a further custom to warrant it.

Having thus seen who may appoint, and who may be appointed an attorney to surrender copyholds, we will now inquire how such attorney may be appointed, and, when he is appointed, how he is to act.

(*q*) 9 Co. 75. *b*.

(*r*) Co. Litt. 59. *a*. 9 Co. 75. *b*. *Comber's case*. Co. Copyh. s. 34. *Gilb. Ten.* 252.

(*s*) Co. Litt. 59. *a*.

How an attorney is to be appointed.

And, in the first place, it is said, that he must be appointed by deed (t): for when a stranger comes into court and declares himself authorized to surrender, and so to convey away the property of another person, it is certainly necessary that such authority should be satisfactorily proved by the solemn instrument of the absent party.

The power may be in this form:

Form of the power.

[69]

“ KNOW ALL MEN by these presents, that I, Timothy Walgrave, of Clayton, in the county of Nottingham, Esquire, a customary or copyhold tenant of the manor of Fairhurst, in the county of ———, have made, ordained, constituted, and appointed, and by these presents, do make, &c. Henry Pemberton, of Fairhurst aforesaid, gentleman, and Edmond Akehurst, of the same place, yeoman, (the bailiff or beadle of the manor of Fairhurst aforesaid,) my true and lawful attorney and attornies, jointly or severally, for me the said Timothy Walgrave,

(t) *Gilb. Ten.* 252. and *Watk.* No. cxiii. p. 450. and see *Co. Litt.* 52. a.

and in my name and stead, to surrender into the hands of the lord or lords of the said manor of Fairhurst, according to the custom of the same manor, all that capital messuage, &c. and also all and singular other my copyhold or customary messuages, lands, tenements, and hereditaments whatsoever, lying or being within, and belonging to, or held of, the same manor, with their and every of their appurtenances; and all my estate and interest therein; *To the use of* Walter Bridgman, of, &c. his heirs and assigns for ever, according to the custom of the same manor: and for me the said Timothy Walgrave, and in my name, to do and execute all and every act and acts, thing and things, as shall be needful and requisite for making such surrender as aforesaid, and for procuring him, the said Walter Bridgman, his heirs and assigns, to be admitted to the said copyhold premises accordingly; as fully, to all intents and purposes, as if I the said Timothy Walgrave, were personally present and did the same myself; hereby ratifying and confirming whatsoever my said attorney or attornies shall lawfully do, or cause to be done, in or about the premises. [70] In witness whereof, I the said

Timothy Walgrave have hereunto set my hand and seal, this day of
in the year of our lord one thousand, &c.”

How the attorney is to act.

When thus appointed, the attorney is to appear in person; for an attorney cannot make an attorney. He then should exhibit his powers that the court or lord, &c. may be satisfied as to his authority. In making the surrender, he must follow the usual customs as to form, as if he was surrendering for himself (*k*). He must pursue the particular powers with which his principal has invested him; for he has no power of his own. If he be authorized to surrender black acre, he cannot surrender white acre; though they both belong to his principal and both be held of the manor. If he be commissioned to surrender to the use of A. he cannot surrender to the use of B. If to the use of A. for life, he will not be warranted in surrendering to the use of A. in fee (*l*).

(*k*) 9 Co. 76. b. 1 *Roll. Abr.* 501. *Copyh.* H. pl. (1).

(*l*) But if A. be admitted, it will be good for his life; for where an attorney exceeds his authority, the excess only shall be void. And see *Co. Copyh.* s. 41. *Tr.* 93.

He ought to act in the name of his principal; for though he may act in *his own* name, it is more proper and regular to do it in the name of the person appointing him (*m*). But he may act within his authority, although his principal be present (*n*).

When the attorney surrenders, let him [71] say,

“ I, Edmund Akehurst, by virtue of the authority to me given by the power of attorney now read, and made by Timothy Walgrave, Esquire, to me, do, for and in the name of the said Timothy Walgrave, surrender and yield up into the hands of the lord of this manor of Fairhurst, all, &c. (*following the description in the power of attorney,*) to the use and behoof of Walter Bridgman, of, &c. his heirs and assigns for ever, by the delivery of this rod.”

Surrender by
the attorney.

Or thus :

“ Timothy Walgrave, of &c. doth by me

In the name
of his principal.

(*m*) See 1 *Salk.* 95-6. *Parker v. Kett.* 9 Co. 76-7.

(*n*) 2 *Ves.* 679. *Mitchell v. Neale.*

his attorney, lawfully appointed by the instrument now read, surrender and yield up into the hands of the lord of this manor of Fairhurst, all, &c. To the use of Walter Bridgman, of, &c. his heirs and assigns for ever, by the delivery of this rod."

Out of court
into the hands
of the lord.

If the surrender be to the lord out of court, it may be thus taken :

*Manor of } BE IT REMEMBERED, that on the
Fairhurst. }* day of in the year of
our lord one thousand, &c. Timothy Walgrave, of Clayton, in the county of Nottingham, Esquire, one of the copyhold or customary tenants of the manor of Fairhurst aforesaid, by Henry Pemberton his attorney, duly appointed by a certain deed poll under the hand and seal of the said Timothy Walgrave, bearing date, &c. did surrender into the proper hands of the lord of the said manor, by the rod, according to the custom of the manor aforesaid, and by the personal acceptance of the said lord, all, &c. *To the use of* Walter Bridgman, of, &c. his heirs and assigns for ever, at the will of the

[72]

lord, according to the custom of the said manor.

Timothy Walgrave,
by
Taken the day and year } *Henry Pemberton,*
first above written by me } his attorney.

A. B. lord of the said manor.

If the surrender be to the steward, say —of the stew-
“by the acceptance of Robert Atkins, ard.
Esquire, chief steward of the said manor,
&c.”

If the surrender be made in court, enter Entry on the
it thus on the roll:— rolls.

“ALSO AT THIS COURT came Timothy Walgrave, of Clayton, in the county of Nottingham, Esquire, by Edmond Akehurst, his attorney, (duly constituted by a certain deed poll, under the hand and seal of the said Timothy Walgrave, bearing date, &c. which was produced and read in court,) and surrendered into the hands of the lord by the rod, and acceptance of the said steward, all that capital messuage, &c. and all his

estate and interest therein, to the use and behoof of Walter Bridgman, of, &c. his heirs and assigns for ever."

A person is not obliged to surrender by attorney,

But here we may observe that a person is not obliged to surrender by attorney; and, therefore, on a covenant to surrender on request, the refusing to execute a power to make a surrender is no breach (z).

[73]
nor the purchaser to accept a surrender so made.

So, a purchaser is not obliged to accept a surrender by attorney, where the necessity is not apparent (a).

The surrender is a relinquishment of the tenancy.

Fourthly, "A surrender is the yielding up of an estate by the tenant *to the lord*."

We have already noticed that the surrender is only the resignation, or returning, or relinquishment of the copyhold to the lord, at whose will it was originally held; we will now, therefore, inquire into the powers and capacity of the lord to accept such surrender.

(z) *Cro. Car.* 299. *Symms v. Lady Smith*.

(a) 2 *Ves.* 679. *Mitchell v. Neale*.

And in the first place, we must observe that a surrender may be made either in or out of court, to the lord in person, to the steward, or his deputy; or by special custom, to the bailiff, beadle, or reeve, or to certain tenants of the manor.

Where and to whom it may be made.

Little need be observed on a surrender in open court: it is a matter of common right. The copyholder has power to surrender in court as incident to his tenure. No special custom is necessary to be alleged for his doing so (b). Such surrender, in the presence of his fellow tenants, is a matter of publicity; it, of consequence, requires no presentment to effectuate it, but is immediately enrolled: and it is simply entered thus:

In open court.

AT THIS COURT came I. S. one of the copyhold or customary tenants of this manor, and surrendered into the hands of the lord, by the rod, and acceptance of his

Entry of such surrender on the roll.

(b) *Co. Lit.* 59. a.

[74] said steward, according to the custom of the manor, all, &c. (c).

Out of court. We will therefore direct our more immediate attention to a surrender out of court ; and proceed to inquire into the capacity of the person to whom a surrender may be made.

And, first, as to the person of the lord.

Who may be such a lord as to take a surrender.

When the surrender is only to operate as a mean of conveyance to a third person, whoever is lord by right or by wrong (d), at the time, is capable of taking such surrender; the lord, in such case, being merely an instrument, the law regards not his title. Whether he be tenant in fee-simple, or only

(c) See *ante*, p. [52.]

(d) But lord, either by right or by wrong, he must be; and, therefore, if the freehold of a particular tenement held by copy be granted to a stranger, such grantee cannot take a surrender; for he is not *dominus pro tempore*. Having no manor, he can, consequently, be no lord. See 4 Co. 25. a, *Murrell v. Smith*. And see *Cro. Eliz.* 252. S. C. and *ante*, c. 2. of Grants.

tenant for years, at will, or by sufferance; whether he have an absolute or defeasible title, or not any title at all; as if he be an abator, intruder, or disseisor; whether he have any interest or not in the manor, as if he be a guardian only, or have only an authority; whether he be an infant, or of full age, &c. (e), it matters not; for in all these instances he would only be the medium of transfer and act ministerially. The [75] surrenderee when admitted will not be in by the lord, but by him who surrendered to his use (f).

But if the surrender be to the lord's own use, or to be disposed of as he shall please, a surrender to a tenant by wrong, as the disseisor of a manor, shall not, it is said, operate as an extinguishment (g). Surrender to a disseisor to his own use.

(e) See 4 Co. 23. b. 24. a. Co. Lit. 58. b. Co. Copyh. s. 34. Viner. Copyh. (G.) (I. b. 3.) Comyns's Dig. Copyh. (C. 3.)

(f) 4 Co. 28. b. and post. p. [106.]

(g) Sir T. Jones, 153. Pit v. Moor. 2 Show. Rep. 156. S. C.

Yet the doctrine, that a surrender to a disseisor shall not operate as an extinguishment, seems questionable. A tenant by wrong, indeed, ought not to be suffered to prejudice him who has right; but it does not appear that if the surrender in this case was to be an extinguishment, it would be attended with injury to any: as to the copyholder, it was his own folly to surrender; and if he suffers in consequence of his own act, he has nobody but himself to blame: and as to the rightful lord, he would be benefited and not injured by the extinguishment of the copyhold; for it would then go along with the manor, and be recovered as part of it on the manor being recovered (*h*). The *grant* of such copyhold by the disseisor, after the surrender, would, most certainly, not be good against the lord by right; for *the voluntary grants* of a disseisor would not be valid; and that was the principal point in the case of *Mpore* and *Pit*. As to the extinguishment, we find a great difference [76] of opinion in that case; and we are told in

(*h*) See *French's case*, 4 Co. 31. a. and b.

Freeman (i), that the court inclined to think that it *was* an extinguishment.

A copyholder may surrender into the hands of the lord as well out of court (k) as in, and even out of the manor (l), without alleging a special custom for so doing.

The lord may take a surrender out of court, or even out of the manor.

Secondly, As to the steward.

Steward.

As the steward, in taking surrenders, acts only ministerially, the law is not very curious in examining the imperfections of his person, nor the lawfulness of his authority; for be he an infant, or *non compos mentis*, an idiot, or lunatic, an outlaw or an excommunicate, yet what things soever he performs as incident to his place can never be avoided for any such disability, because he performs them as a judge, or at least as custom's instrument. And for his authority, though it prove but counterfeit, if it come to exact

(i) 1 *Freem.* 245.

(k) *Co. Litt.* 59. a.

(l) 1 *Salk.* 184. *Dudfield v. Andrews.*

trial, yet, if in appearance or outward show it seems current, that is sufficient (m.)

As he acts, therefore, merely as an instrument in these cases, no one can suffer from his want of a legal authority, since he only does that which he who has authority is compellable to do; and a tenant, when about to surrender, is not to investigate the legitimacy of his powers. If he acts ostensibly as steward it is enough.

[77] A steward, as incident to his office, may
 A steward may take a surrender out of the manor, &c.
 take a surrender out of court (n), or even out of the manor (o): and may, as a consequence, take the examination of a feme covert (p); though the surrender be to his own use (q): and this without any special custom to warrant him, and though he be retained only by parol.

(m) *Co. Copyh. s. 41. Tr. 104.*

(n) 1 *Salk. 164. Dudfield v. Andrews. Co. Lit. 59. a. n. (6).*

(o) 1 *Lord Raym. 76. Tukely v. Hawkins.*

(p) *Cro. Jac. 526. Smithson v. Coge.*

(q) *Cro. Elis. 717. Erisk v. Rives.*

So, the copyholder may surrender to him by attorney without alleging a custom (r). So he may take a surrender by attorney.

So, a surrender to a deputy steward is good(s). So, a deputy may appoint another person to take a surrender (t), though it be to be taken out of the kingdom(u): and it should seem that the person so deputed may do any act which his principal might have done(w), and, by consequence, take the examination of a feme covert (x). Deputy steward.

Thirdly, As to the bailiff, beadle, or reeve. Surrender to the bailiff, &c.

A copyholder may surrender out of court to the bailiff, beadle, or reeve of the manor,

(r) See *ante*, p. [67.]

(s) 1 *Comyns's Rep.* 84. *Parker v. Keck.* 1 *Lord Raym.* 658. S. C. 1 *Salk.* 95. S. C. See *Moore*, 112. Ca. 253.

(t) See *Parker* and *Keck*, as before.

(u) 4 *Leon.* 111. *Heggor* and *Felston*.

(w) See 1 *Lord Raym.* 659.

(x) 1 *Leon.* 289. *Burgesse* and *Foster.* *Cro. Eliz.* 48. *Burdet's case*, and see *Cro. Jac.* 526. *Smithson* and *Cage*.

[78] by virtue of a special custom ; but not without : and as a special custom is thus necessary to warrant such surrender, the copyholder cannot, without the like special custom, surrender to them by attorney (*y*).

To tenants
out of court.

And, *lastly*, a copyholder may surrender out of court, by special custom, to certain tenants* of the manor ; as into the hands of two tenants (*z*) ; or of one tenant (*a*) ; or to one tenant in the presence of other persons (*b*).

And the heir of a copyholder is a sufficient tenant for the purpose of taking such surrender before his admittance (*c*).

(*y*) *Co. Litt.* 59. *q*.

* Custom to surrender, &c. in the presence of "sufficient witnesses," though not tenants. See Appendix, No. II. *Customs of Yestminster, prima Co. Dorset.*

(*z*) *Co. Litt.* 59. *a*. *Co. Copyh.* s. 34. *Tr.* 79. 9 *Co.* 76. *a*. and *b*. *Chapman's case* cited.

(*a*) *Kitch.* 102. *b*. 1 *Roll. Rep.* 125.

(*b*) *Kitch.* 102. *b*.

(*c*) 1 *Keb.* 25. *Muniface and Baker, p. Twisden.* The heir before admission is tenant by copy of court-roll. See 4 *Co.* 22. *b*.

But a copyholder, after attainder for felony, cannot take such surrender; though he be pardoned; for, on attainder, he ceased to be a tenant (*d*).

As a special custom is requisite to warrant a surrender to tenants out of court, so a copyholder cannot surrender to them, when so warranted, by attorney, without a further custom to enable him to do so (*e*).

So, such tenants who are authorized to take a surrender cannot take the examination of a feme covert without a special custom empowering them so to do (*f*).

If a copyholder covenant to surrender his copyhold, and afterwards surrender it to two tenants out of court, according to the custom; it will be a good performance (*g*).

[79]

(*d*) Sir *T. Jones*, 190. *Benison and Strode*.

(*e*) *Ante*, p. [68].

(*f*) *Cro. Eliz.* 717. *Erish and Rives*.

(*g*) 3 *Salk.* 100. *Page v. Smith.* 1 *Levinz.* 293.
Beany v. Turner. 2 *Keb.* 660. *Turner v. Benson*.

But if a tenant refuse to take a surrender out of court, where the custom is that he may take such surrender, yet no action lies against him (*h*).

Presentment. When a surrender is made out of court into the hands of any who cannot thereupon make an admittance, or if no admittance be immediately made by a person enabled to admit, such surrender should be regularly presented.

When requisite. From the general terms in which the necessity of a presentment of a surrender made out of court is asserted in many of our books, it seems to have been too often inferred, that such presentment is equally requisite into whose hands soever the surrender is made.

No presentment required when the surrender is made to the lord, and admission be immediately made. It is said in *Calthorpe*, that if the lord, having copyhold lands surrendered into his hands, will, in the presence of his tenants

(*h*) 1 *Roll. Rep.* 126. in the case of *Ford* and *Hoskins*.

out of court, grant the same to another; and the steward enter the same into the court book, and make thereof a copy to the grantee; and the lord die before the next court; it will be no good copy to hold the land (i).

But it must be evident, from the reason of the thing, as well as from the weightier testimony of other writers, that the presentment is only for the information of the lord, to apprise him that such surrender has been made (k). [80]

To what purpose can it be to make known to the lord that such surrender was made, when the lord knows it already. Why declare to him that it was taken, when he must be conscious that he had taken it himself? Besides, who is to present a surrender taken by the lord? The lord may take a surrender without the presence of a tenant. Is the lord to present it himself? But to whom is he to present it? Whom is

(i) *Calth.* 46.

(k) *Gilb. Ten.* 278.

- he to inform of the event? He cannot present it to himself; and he is not obliged to say any thing about the matter to his tenants. When the lord, therefore, takes a surrender out of court, he may admit without any presentment (l).

So as to the
steward.

- The same reasoning holds equally good as to the steward, in cases where the surrender is only the mean of conveyance. He may accept such surrender and immediately admit the *cestuy que use* (m). It is clear that many of the books, when speaking of the necessity of a presentment in case of a surrender being made *to the lord* out of court, mean only a surrender made out of court to the lord *by the hands of tenants, or of those of the bailiff or reeve* (n).

[31]

(l) 1 *Roll. Abr. Copyh.* (M) pl. 4. p. 502. *Froswell v. Welch.* and see the S. C. at large. 1 *Roll. Rep.* 514. and 3 *Bulstr.* 214. *Godb.* 268. and see also *Watk. Gilb.* 278-9. and No. cxi. p. 447. 9.

(m) See *Froswell and Welch*, as before, and *Watk.* No. cxi. and cxii. to *Gilb. Ten.*

(n) See *Co. Litt.* 62. a. *Co. Copyh.* s. 40.

But if the surrender be taken out of court by the lord or the steward, personally, and no immediate admission be made, the memorandum of the taking of such surrender, signed by the tenant who surrenders, and the lord or the steward taking it (o), should be certified and produced, on admittance being requested at a future time, from the lord if the steward had taken it, or from the steward if taken by the lord.

But if the surrender be made out of court, and the admission in, it should be so certified.

If admittance be immediately made by the lord or steward taking such surrender, yet such admittance should be regularly notified at the next court-day for the information of the tenants. This too was more immediately necessary in ancient days, as, in case the tenants should have known any objections to the person so admitted, of which the lord might have been ignorant, they might have informed him of them; from which he might have been induced to resume the estate, as having conferred it on a person who was unworthy of the grant. Add to this, that it must be regularly in-

And if the admittance be out of court also by the person taking the surrender, yet it should be certified at the next court day.

(o) *Ante*, p. [71.]

serted on the court-rolls of the manor, by a copy of which he is to hold (p).

But if the surrender be made to any other person than the lord or steward, a presentment will be necessary.

[82]

If the surrender be made into the hands of tenants, or into those of the reeve or bailiff, or, in short, of any other person than the lord or steward, the surrender must be presented in court, in order to inform the lord or the steward that such surrender was taken (q). And the presentment is thus made: the person who took the surrender comes into court and produces the memorandum, if any; if there be none, he certifies to the court that the surrender was duly made into his hands, and then the homage present it: and the presentment is thus entered:

Entry of presentment on the rolls.

“AND the homage aforesaid also find and present, that A. B. one of the copyhold or customary tenants of this manor, who held to him and his heirs, at the will of the lord, according to the custom of the manor aforesaid, *All* that customary or copyhold mes-

(p) *Watk. Gibb. Ten.* 449. cxi.

(q) *Co. Litt.* 59. a. &c.

suage, &c. *DID*, out of court and since the last court, surrender into the hands of the lord, by the rod, and acceptance of C. D. the bailiff of this manor, (or E. F. one of the customary tenants of this manor; *as the case may be*) according to the custom of this manor, *All* that his said customary or copyhold messuage, &c. *To the use of, &c.*"

Or thus :

" ALSO AT THIS COURT came A. B. and C. D. two of the copyhold or customary tenants of this manor, in their proper persons, and certified in open court, and thereupon the homage present, that, out of court, and since the last court, E. F. who held to him and his heirs at the will of the lord, according to the custom of this manor, *All, &c. Did* surrender into the hands of the lord, by the rod, and acceptance of the said A. B. [83] and C. D. according to the custom of this manor, *all* that his said copyhold or customary messuage, &c. *To the use of, &c.*

Such surrender, so taken out of court, should be regularly certified by those who took it. But this, though frequently

By whom to be certified.

affirmed in the books to be indispensable, is now acknowledged not to be of necessity. If the tenants or bailiff who took such surrender die, yet it may be presented on good proof (r). And if they are living and do not certify the taking, yet, if it be satisfactorily proved to the court that such surrender was made, it is sufficient (s). Were it to depend wholly on the personal testimony of the individuals who took it, the time allowed by the custom for presentment might elapse before they chose to certify (t). Besides, the only end of such testimony is to inform the lord or steward that the surrender was duly taken; and if this be accomplished it is enough. If the lord or steward be satisfied that such surrender was absolutely made, they may notice it without a

(r) *Gilb. Ten.* 220. *Cro. Jac.* 403. *Frosel v. Welch. Co. Copyh.* s. 40.

(s) *Gilb. Ten.* 280. *Lex Cust.* 240. ch. 16. And see *Cro. Jac.* 403. *Frosel v. Welch.* But it is said in 3 *Bulst.* 218. that a special custom may confine such notification to the individuals who took the surrender.

(t) In case of refusal to present we are told by *Lord Coke*, that on petition or bill exhibited in the lord's court, the party grieved shall there find remedy. *Copyh.* s. 40. p. 89.

presentment; and their admittance of the surrenderee will be good (*u*). The end of [84] the presentment is answered; and therefore it would be nugatory to present.

But here we may remark the utility of making a memorandum of the taking such surrender out of court, and of its being regularly signed by the surrenderor and the person or persons into whose hands it is made (*w*); that, in case of death, or refusal, or negligence of the persons taking it, the surrender may be the more easily proved.

The presentment of a surrender should, ^{When to be made.} by the general custom of manors, be at the

(*u*) *Gilb.* 278-9. 3 *Bulst.* 217. 219. *Rosewell v. Welsh.* But this is while such surrender continues in force: for, if the surrender become void for want of a timely presentment, or from not being acted on within due time, a subsequent admission will not give it effect. The lord cannot notice a surrender which has ceased to exist. The surrender, in such case, would be utterly at an end, and consequently there could be none on which to found such admission.

(*w*) See *ante*, p. [71], &c.

next court; though, by special custom, it may be at a subsequent one (*x*).

And the presentment of a surrender to the use of a will may, by special custom, be made at the next court after the death of the surrenderor, though it be not the next after the surrender made: and it should seem also that it would be good without such special custom (*y*).

- [85] If the surrender be not certified within the time prescribed by the custom, the homage, it should seem, would be justified in refusing to present it (*z*). For such custom, being in itself so salutary and reasonable (*a*), ought to be strictly observed: and it does not appear that it can be in the power of the homage to rescind or dispense with it. When the prescribed time is

(*x*) *Co. Copyh.* s. 40. *Tr. 88. Co. Lit.* 62. a. See 2 *Ves.* 302. 602. 680. A year and a day. *Carter*, 71.

(*y*) See *Com. Dig. Copyh.* (F. 9. & 10.).

(*z*) See 2 *Vern.* 564. *Taylor v. Wheeler*.

(*a*) See *Gilb. Ten.* 280.

elapsed, the surrender would, it should seem, become absolutely void at law (b).

Equity will, however, under certain circumstances, aid against the want of a timely presentment (c).

Want of presentment aided in equity.

Again, such presentment of a surrender out of court may be made though the sur-

Presentment to be made, though the surrenderor &c. die.

(b) *Co. Litt.* 62. a. See 2 *Salk.* 449. *Taylor v. Wheeler.* 2 *Vern.* 564. S. C. 2 *Vern.* 609. *Jennings v. Moore & al.* If the custom limit a certain time, as twelve months, it is said that the presentment would not be good if made afterwards, though no court was held during the twelve months; see *Carter*, 75. *Smith v. Paynton*, for the surrenderor should have procured a court. See *Cra. Jac.* 403. But the surrenderor shall in such case be compelled to surrender again. See 2 *Vern.* 564. *Taylor v. Wheeler*, and *post.* p. [88.]

(c) Cases of *Taylor v. Wheeler*, in *Vern.* and *Salk.* *Jennings v. Moore & al.* &c. and 2 *Ves.* 633. *Hinton v. Hinton.* *Bro. Cas. Parl.* *Blenkarne v. Jennens & al.* (V. 2. p. 278. 8vo. edit.) A. surrendered to uses of will, and devised to his son Andrew in tail,—remainder to Cornelius (a son by second wife) in tail. Surrender void for want of presentment. Andrew died, *s. p.* leaving a sister of the whole blood his heir. Surrender supplied in favour of Cornelius. No admission of Andrew. *Lloyd v. Burton*, *ibid.* p. 281. and 6 *Vin.* 56.

surrenderor, or the surrenderee, or both of them, happen to die before such presentment be made (*d*).

The surrender does not derive its obligatory power from the presentment.

[86]

Much is to be found in the books of the obligatory power of the presentment, with respect to surrenders out of court. The surrenderor is not, it is repeatedly affirmed, concluded till the surrender be presented. Before actual presentment say they, he may surrender to another person; and if the second surrender be presented and admittance ensue, it shall totally annul the former (*e*).

That the estate continues in the surrenderor till presentment is clear: and it is equally clear, that it continues in him till admission (*f*). And it is clear also that the ensuing admission shall relate to the surrender and defeat the mesne acts of the surrenderor (*g*).

(*d*) 4 Co. 29. b. 5 Bur. 2764. Vaughan d. Atkins v. Atkins. 1 Salk. 185. Benson v. Scott.

(*e*) See the case of *Burgoine and Spurling, Cro. Car.* 283. Sir W. Jones, 306. &c. *Gilb. Ten.* 281.

(*f*) *Post.* p. [100.]

(*g*) Benson and Scott, *Carth.* 275. &c. Vaughan d. Atkins v. Atkins. 5 Burr. 2764. And *post.* p. [103.]

But the truth seems to be that so soon as the copyholder surrenders, though out of court, for a valuable consideration (*h*), so soon is the surrenderor concluded at law (*i*), as well as in equity (*k*); and his hands for ever bound up from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act (*l*). [87]

If, indeed the surrender be merely *voluntary* the surrenderor may revoke it, not only at any time before presentment, but, ac- Revocation
of a surren-
der.

(*h*) See *Kitch.* 82. a. *Co. Copyh.* s. 39. *Tr.* 87-8.

(*i*) See *Kitch.* and *Co. ubi sup.* 2 *Blackst. Comm.* c. 22. p. 368-9. and 4 *Burr.* 1961. Lord Mansfield, in the case of *Vaughan d. Atkins v. Atkins*, said the "surrender is a complete execution of the contract, as between the vendor and vendee." 5 *Burr.* 2785. And in that of *Roe d. Noden v. Griffiths*, he repeatedly declared that "the land was bound by the surrender." 4 *Burr.* 1961. So also in that of *Vaughan d. Atkins v. Atkins.* 5 *Burr.* 2787. See also *Salk.* 185. *Benson* and *Scott*; and 1 *Durnf. & East*, 601. *Holdfast d. Woollams v. Clapham.*

(*k*) See *Taylor and Wheeler.* 2 *Salk.* 449. and 2 *Vern.* 564. *Jennings v. Moore et al.* 2 *Vern.* 609.

(*l*) *Co. Copy.* s. 39. *Tr.* p. 88. 2 *Bl. Comm.* 369.

according to *Kitchen*, ("a book," said C. J. Willes, "of good authority; and the rather because founded on old determinations, not advancing fancies of their own (m),") at any time before admission: "and this," said he, "is most commonly done, and that with reason; and such appears to me to be the law (n)."

It is not, therefore, in either case, the presentment that concludes the surrenderor. In the case of a surrender for a valuable consideration, he cannot revoke it, or possibly delude or defraud the surrenderee of the effects of his surrender or the fruits of his grant (o).

And where the surrender is *merely voluntary*, he may revoke *after presentment* as well as before (p).

(m) 2 *Ves.* 609.

(n) *Kitch.* 82. a. Revocation of a voluntary settlement. See *Cowp.* 705. *Doe v. Routledge*.

(o) *Co. Copyh.* s. 39. *Tr.* p. 88.

(p) *Kitch.* 82. a. as before.

If indeed the custom require that a surrender should be presented within a limited time, and declare that it shall be void if not presented within such time, if it be not presented within such time, it must, of consequence, be annulled: but this does not prove that it was revocable *before* it was rendered void. If it become void by reason of a want of a timely surrender, the surrenderor will [in cases of valuable or meritorious consideration,] be compellable to surrender anew (*q*). [88]

Surrender becoming void on non-presentment within time.

the vendor must make a new surrender.

Great care, however, should be taken that the presentment be duly made within the time which the custom has prescribed, and that the presentment, when made, exactly "ensue" or correspond with the surrender.

The presentment must accord with the surrender.

And, on this latter point, the observations and reasoning of the late Lord Chief Baron *Gilbert*, are so just and forcible that I shall give his own words.

(*q*) See 2 *Vern.* 564. *Taylor v. Wheeler*, and *ante*, p. [85.]

“My Lord *Coke* says, (r), that presentments of surrenders ought, in all material points, to ensue and agree with the surrenders themselves, else the surrender, presentment, and admittance thereupon will be void, which seems reasonable; for if the presentment in matter differs from the surrender, the lord has no sufficient notice of the surrender, and then the admittance of it in reason must be bad, and not help out the presentment; for if the lord knew the true surrender, perhaps he would never consent to such a surrender; and the true surrender ought to be known, that the lord may know his tenant, and from whom to take his services. The admittance cannot help out, for that was grounded upon the presentment; [89] but if the lord had notice of the true surrender, though the presentment did differ, yet it seems reasonable the admittance should enure according to the surrender, because he had notice of the true surrender, and when a man is admitted, he is in by the surrender.

(r) *Co. Copy.* s. 40. *Tr.* p. 88. 4 *Co.* 25. a. 2 *Bl. Comm.* 369. ch. 22.

Where it is said that, if the presentment differ in points material from the surrender, that there the admittance, presentment, and surrender, are all void; it seems this must be understood, if the time for presenting the surrender be past; for if there should be a presentment and admittance made contrary to the surrender, sure this will not make the surrender void before the utmost time allowed by law for the surrender's being presented; for it is no reason to say that because the presentment is void, that therefore the surrender is void; for the surrender depends not on the presentment, though it may be void because not presented, but not because ill presented. So that if after such ill presentment and admittance, there should be a good presentment and admittance, it seems the surrender and all other acts will stand good (s).

If the presentment be truly made, and accord with the surrender, and yet be wrongly entered upon the rolls, the rolls shall be amended.

An erroneous entry on the roll may be amended.

(s) *Gilb. Ten.* 336.

[90] As if a surrender be made upon condition, and so presented, and the steward, in entering it, omit the condition, enrolling it as an absolute one, yet, upon sufficient proof made in court, the surrender shall not be avoided, but the roll, being no estoppel nor record, shall be amended, and this shall be no conclusion to the party, to plead or give in evidence the truth of the matter (*t*). And though the admission was absolute, yet the surrenderee shall be subject to the condition; for when admitted, he shall be in by the surrenderor, and the lord cannot vary his estate (*u*).

(*t*) *Co. Copyh.* s. 40. p. 89. *Gillb. Ten.* 192. 254. *Dyer*, 251. b. *Winter and Jeringham*. In the case of *Winter and Jeringham*, the enrolment embraced more copyhold property of the tenant than the surrender, and the question was whether more should pass? And we are told that "it was in debate for the space of 24 years in several courts; and, by the opinion of *Dyer*, no more than was particularly expressed in the surrender should pass. And accordingly a decree was made by Lord Wentworth, Lord and Chancellor of his manor of Hackney; whereof he afterwards repented: yet many others agreed with the above opinion as law." See also *Cas. T. Finch*, 254. *Brend v. Brend*.

(*u*) See 4 *Co.* 28. b. and 3 *Burr.* 1543. and 4 *ibid.* 1961.

Fifthly; "A surrender is the yielding up of an estate by the tenant to the lord, either as a *relinquishment or resignation of such estate*, or as the mean of conveying or transferring it to another."

And here we shall consider such surrender as a *relinquishment or resignation of the copyholder's estate*.

Surrender considered as a relinquishment of the estate.

Long after the *Norman* conquest there were many villeins or bondmen in so abject a slavery as to hold the portions allotted them of the demesnes of the manor absolutely at the will of the lord; being neither permitted to hold them against the lord's inclination, nor to quit them without his permission. So far from acquiring property themselves, they themselves were the property of their lord. Instead of the lands belonging to them, they were regarded as annexed to the lands. On a grant of the manor they passed as appendages; and were not considered as having a will of their own.

Under the ancient law there were villeins who could not relinquish.

[91]

There were others who, though they held at the will of the lord, might have quitted or renounced the tenancy when they thought proper to do so.

There were others who might have done so.

A third class
were irremov-
able while
they perform-
ed their ser-
vices.

Again, a third class existed who could neither be removed or expelled from their lands, while they performed the services imposed, nor compelled to hold them against their inclinations (*w*).

So a copy-
holder cannot
be expelled
but by reason
of his own
act:

[92]

Without tracing, however, the changes which the villein tenure experienced, or the melioration of the state of the peasantry, we may remark that it has been long established that the copyholder cannot be deprived of his lands, (though he is still said to hold at the will of the lord) but by his own act or misconduct (*x*). If he neglect or refuse the returns which he is bound by his tenancy to render; if he do any act incompatible with the nature of his tenure, or injurious to the estate which he holds, a forfeiture will be justly incurred. But while he duly performs his services and acts consistently with his relations to the lord, he has a right to retain his lands till he choose to relinquish the tenancy.

(*w*) See 1 *Bl. Law Tr.* 119. &c. and the authorities there referred to, and *Watk.* No. cxli. to *Gilb. Ten.* p. 462.

(*x*) See *ante*, ch. 2. Of Grants, p. [44,] &c.

If he is desirous of returning the lands to the lord, he may surrender up the possession to him by the accustomed symbol, and in the usual form, as he would have surrendered it to the use of any other person; declaring expressly his intention that it shall be to the use or benefit of the lord, or, in the language of earlier days, "that the lord may do therewith his will(y)." but he may relinquish his estate.
Express relinquishment.

Though no use be expressed, yet if it be merely surrendered into the lord's hands, and there be no peculiar circumstance in such surrender to rebut the presumption, it will be a sufficient relinquishment; and shall be to the benefit of the lord: as the surrender in itself is no more than the returning the possession of, and right to, the tenements to the lord of whom they are held. And if there be nothing to induce a different construction, if there be no apparent end which such different construction No use expressed.

(y) Of a surrender to the *disseisor* of a manor, see *ante*, p. [75.]

can answer, the surrender must have its natural effect (z).

[33]
Relinquish-
ment.

There are many modes by which the tenancy may be relinquished, but they will more properly fall under our consideration when we come to treat of the extinguishment of copyhold property (a).

But the lands
may be again
granted by
copy.

When a copyhold is thus returned to the lord it still retains its demisable qualities; but, till granted again by copy, it shall follow the manor into whose hands soever it pass (b).

Surrender
considered as
the mean of
conveyance.

In the next place, we shall consider such surrender as the *mean of conveying or transferring a copyhold to another*.

We have already seen the *necessity* of a

(z) See 1 *Lord Raym.* 627. *Fisher and Wigg, p. Holt. C. J.* 1 *P. W.* 17. *S. C. Watk. No. cxvii. to Gilb. Ten.* 457.

(a) *Post.* ch. 9.

(b) *Post.* ch. 9.

surrender as such mean of conveyance and the principles on which it depends (c).

We have seen too, that, though the copyholder held originally merely at the will of the lord, the law has so established his interest that he cannot be dispossessed of his tenements while he renders his services and observes the customs of the manor (d). As the law has thus established his interest, it has also enabled him to transfer it to another on pursuing the accustomed forms. The copyholder has now in most cases a right to nominate a person to succeed him in his tenancy; whom (if such person has no legal incapacity to take) the lord is compellable to accept as his tenant (e).

Right of the copyholder to transfer his interest.

The surrender, therefore, in these cases is only a form; it is merely the medium of conveyance: for even where it is strictly observed, it is now purely subservient to

[94]

Surrender a form.

(c) *Ante*, p. [43.] [50.] &c.

(d) *Ante*, ch. 2. p. [44.] Of Grants.

(e) *Ante*, p. [51.] [52.] and *post.* ch. 6. Of Admission.

the conveniency of the tenant, as a mode of transferring his interest.

On surrender
no estate
passes to the
lord.

Surrenderor
remains te-
nant till ad-
mission of
surrenderee ;

and may sur-
render to ano-
ther without
a formal re-
vocation.

On such surrender being made, no estate passes, in consequence, to the lord (*f*), but it remains, till the nominee be admitted, in the surrenderor. *He* continues tenant; and must answer the services and returns (*g*). Till such admission of the surrenderee, the surrenderor may maintain an action of trespass (*h*); and, if he die, the premises will descend to his heir (*i*).

If he surrender to the use of any one without consideration, he may again surrender to another without a formal revocation of the first surrender (*k*). So, if he surrender to the use of his will, and afterwards, without taking any notice of such surrender, he surrender to another fee, the second surrender will be good (*l*).

(*f*) *Cro. Car.* 283. *Burgoin and Spurling*.

(*g*) *Co. Copyh.* s. 39.

(*h*) *Cro. Eliz.* 349. *Berry and Greene*.

(*i*) *Cro. Jac.* 403. *Frosel v. Welsh*.

(*k*) See *ante*, *Cro. Car.* 283. *Burgoin and Spurling*.

(*l*) *Cro. Eliz.* 442. *Fitch and Hockley*; and see

So, as a surrender is merely to effectuate the copyholder's alienation, no more shall pass by it than it was his intention to pass: if the copyholder, therefore, surrender to the use of A. for life, or in tail; or to the use of his last will; and he die without making a will; or, if making a will, he limit only a portion of the estate; the residue, or part undisposed of, in the first and last cases, and the whole in the second, will be the old estate and descend to his customary heirs (*m*).

No more passes than to answer the intent of the surrenderor.

[95]

The residue continues in him.

So if he surrender to particular uses with the ultimate limitation expressly to his own right heirs, they shall take such limitation as the old estate, and, consequently, by descent (*n*).

If he limit to his own heirs they shall be in of the old estate.

2 *Just. Blackst. Rep.* 1046. *Thrustout d. Gower v. Cunningham*. [But in case no admittance take place, under the second surrender, a devise of the copyhold will be supported by the former surrender to the use of the will. *Ibid.* and see 16 *Ves. Jun.* 527. also *infra*, p. [123].]

(*m*) 9 *Co.* 107. a. 1 *Brownl.* 181. *Cro. Eliz.* 148. *Bullen and Grant. Ibid.* 442. *Fitch v. Hockley.* 4 *Co.* 29. b.

(*n*) 4 *Burr.* 1952. 1960. *Roe d. Noden v. Griffiths*. [And note, that in a case of uncertainty, as to whether

Distinction in
Allen & Pal-
mer contro-
verted,

A difference, indeed, has been taken, as to this latter point, when the surrenderor takes a particular estate himself, and when not. As, if a surrender be made to the use of the surrenderor for life, with remainder to a stranger in tail, and the ultimate limitation be to the heirs of the surrenderor, his heirs shall take by *descent*: yet if the surrenderor take *no particular estate himself*, and the ultimate limitation then be to his own heirs, such heirs, it is said, shall be in *by purchase* (o).

But although this distinction is recognized in the case of *Roe v. Quartley*, (by *Ashurst*, J. when delivering the opinion of

by the term "Right heirs of A." in the ultimate limitation of an estate, be meant the right heirs of the surrenderor, or those of another person mentioned in the surrender of a similar name, it would be sufficient to support an ejectment for the right heir of the surrenderor, to shew the existence of such uncertainty on the face of the surrender; for to defeat his title it must be distinctly made appear, that such ultimate remainder passed out of the surrenderor. See 9 *East*, 407. and *infra*, p. [107.] note (k).]

(o) See the case of *Allen and Palmer*, 1 *Leon.* 101. and *Kitch.* 86. a. 88. a. and b. *Lex Cust.* 125. ch. 15.

the court (*p*) ;) yet such distinction has been questioned by C. B. Gilbert (*q*) ; and, [93] after him by Mr. Fearne (*r*).

Had the ultimate limitation been expressly made *to the surrenderor and his heirs*, whether he himself had, or had not, taken a particular estate, his heirs would necessarily have been in *by descent*. But whether such surrenderor would have taken such ultimate estate (without taking a particular one) as a *remainder*, or as *his reversion*, seems to have been disputed. According to the distinction above noticed, and especially the case cited in *Kitchen*, the surrenderor would have taken it *as a remainder* : but according to later decisions, and particularly the case of *Roe d. Noden v. Griffiths* (*s*), he would have been in of his *old estate*.

(*p*) 1 *Durnf. and East*, 634.

(*q*) *Ten.* 272-3.

(*r*) *Conting. Rem.* 48. 3d Ed. 86. 4th Ed. [67. Ed. *Butl.*]

(*s*) 4 *Burr.* 1952. and see *Thrustout d. Gower v. Cunningham. Fearne*, 90. (4th Ed.) and 2 *Just. Blackst. Rep.* 1046.

And it has, indeed, been, I believe, uniformly held that, if a copyholder in fee surrender his estate to the use of his will, and devise to a stranger for life, or in tail, and so leave a portion of the fee unlimited, (*without* giving it expressly to his heirs) it shall be considered as his reversion, or undisposed of residue, and go to his heirs by descent (*t*). So, where a copyholder, seized in fee, surrendered to the use of his will, and afterwards *surrendered* to particular uses, with the ultimate limitation to his own right heirs; it was adjudged that he was in of his *old estate*, and that he might have devised his reversion without any fresh surrender or admission (*u*).

Now the idea that when the ultimate limitation was *expressly* made to the heirs of the surrenderor, the heirs should take by *purchase*, and when it was not expressly made to them, but resulted or arose by im-

(*t*) 1 *Leon.* 174. *Bulleyn and Grant.* *Cro. Eliz.* 148. *S. C.* 4 *Co.* 29. *b. Bunting and Lepingwell.*

(*u*) *Thrustout d. Gower v. Cunningham.* 1 *Fearne*, 90. and 2 *Just. Blackst. Rep.* 1046.

plication, they should take by *descent*, originated in this; that the estate being yielded to the lord, the uses limited were *new* uses; and as the *whole estate* was thus limited, nothing remained in the surrenderor. But when the whole was *not* so limited, the residue, as *undisposed* of, resulted to him again. And a distinction similar to this was once held as to freeholds (*w*). But as such distinction, with respect to freeholds, has been now long exploded; it having been repeatedly declared that it matters not whether the ultimate limitation to the heirs of the grantor be expressly made or result by implication of law (*x*); and as the doctrine once entertained that by a surrender of a copyhold the *old* estate of the surrenderor was destroyed, and the uses limited to his heirs on such surrender were absolutely new, and such as if limited to his heirs, should be taken by purchase, is also ex-

[98]

(*w*) *Dyer*, 134. *a. pl. 7. &c.* and *Hob.* 31.

(*x*) 3 *Levinz.* 406. *Godbolt v. Freestone.* *Salk.* 591. *Abbott v. Burton*, and both recognized in 2 *P. Wms.* 138. *Harris v. Bishop of Lincoln*, where the case in *Hob.* 31. was denied to be law.

ploded by modern decisions (*y*); it should seem that the distinction above noticed is also antiquated as to copyholds.

Surrender
passes only
what the te-
nant has a
right to trans-
fer.

Again, a surrender when considered as the mean of conveyance can, by the terms, pass that only which the copyholder has to transfer (*z*). If a copyholder for life, therefore, surrender to another for the life of that other, it will only give the second a right to an estate for the life of the first; even if a custom be alleged to the contrary (*a*). If the lord, indeed, chooses to admit the second person to an estate for his life, it may operate as a grant; and the lord will be bound by his own act. But in that case, the second person will not be in by the surrenderor, but by the lord (*b*).

(*y*) See 1 *Fearne*, 88, [67. *Ed. Butl.*] &c. and the cases by him cited, and 1 *Strange*, 487. *Smith v. Trigg*.

(*z*) See *Co. Copyh.* s. 34. *Tr.* 76.

(*a*) *Moore*, 8. *ca.* 27. and see *Gilb. Ten.* 257. and *Watk.* No. cxix. and cxx. p. 451-3.

(*b*) See *Watk.* No. cxix. and cxx. to *Gilb. Ten.* p. 452. and see 4 *Leon.* 88. *ca.* 184. [Also *supr.* p. [24.][52-3.] in *not.*]

The copyholder can only transfer his own interest and nominate another to take what he himself has to relinquish. He cannot convey what he has not: *that* cannot be transferred which is not in existence. So if any further interest *be* in existence and vested in another person, the surrender of the immediate copyholder cannot convey such further interest. He may transfer his own property; but not that of others. Hence a surrender shall pass no more than what the person making it may lawfully pass (c). It shall not work a wrong. A surrender by the husband will be no discontinuance of the wife's land (d).

[99]

A surrender by a tenant in tail may bar his issue; but this is on a different princi-

(c) *Co. Copyh.* s. 34. *Tr.* p. 76. [It may further be remarked, that a surrender, in whatever terms it may be conceived, can only point out to whom, and for what estate the land is meant to be transferred by the person making such surrender. It can work no alteration in the terms of the tenure itself; neither can it vary the custom of the manor any more than an admittance; but both the tenant and the lord are equally bound by the custom. See 7 *East*, 429.]

(d) 4 *Co.* 23. a.

ple; which will be noticed in the chapter on entails (e).

Having thus considered the surrender as it respects the person who makes it, we will now inquire into its effects as it regards the surrenderee.

Surrenderee
does not take
strictly as a
cestui que use.

And in the first place, it has been remarked that though a surrender is generally said to be made *to the use* of another, yet the person in whose favour it is made shall take merely as a *nominee* or *appointee*: he is not properly *cestui que use*. The surrender is only a direction to the lord how to grant the lands. The estate remains in the surrenderor, and not in the lord. A surrender therefore, is not to receive a construction similar to that of an use or trust (f). A

(e) *Post.* ch. 4.

(f) *P. Holt*, C. J. in the case of *Fisher and Wigg.* 1 *P. Wms.* 17. 1 *Lord Raym.* 627. and by *Hardwicke*, C. in the case of *Rigden v. Vallier.* 2 *Ves.* 257. and see 1 *Brownl.* 127. *Allen and Nash.*

But the *surrenderor* has been considered as a *trustee* for the surrenderee. See 1 *Durnf. & East*, 601-2. With respect, indeed, to the *lord* he is merely a *nominee*. The lord is not *seized* to his *use*.

very extraordinary reason is, indeed, given [100] for this in *Vesey*; which is, that copyholds are not within the statute of uses. That copyholds are not within the statute of uses is certain: but it does not follow from thence that the person taking should not have taken as *cestui que use* at common law. Had he taken as *cestui que use* before that statute, he would have taken as such after it: for the statute would not have altered the nature of the thing; nor made it less an use, though it did not embrace copyhold property within its provisions.

The surrenderee, therefore, taking merely as nominee, as the person expressly designated by the surrenderor for the admission of the lord, was not, till such admission actually made (g), considered as having any thing in the premises: neither a *jus in re*, nor yet *ad rem*. But this, indeed, was the language applied to the *cestui que use* of freeholds before the statute.

Before admission he was said to have neither a *jus in re*, nor yet *ad rem*.

Such nominee could not, before admis- He could not enter without consent.

(g) For it is the admission, and not the *presentment*, which makes him tenant. See before, p. [86.]

[101]

Nor maintain
trespass.Nor surrender
to another.

sion, even have entered upon the lands surrendered to his use, without being regarded as a trespasser (*h*): unless, indeed, it was by the permission of the surrenderor; and then he was considered as his tenant at will (*i*). The surrenderor continuing tenant to the lord, must, of consequence, retain the possession. He is answerable to the lord for the services due, and therefore must be entitled to the profits and fruits of the premises. The surrenderor, consequently, and not the surrenderee, must be the person to maintain an action of trespass (*k*).

Having, therefore, no estate in the premises, he has none to convey or to forfeit. He cannot surrender to the use of another; for he has nothing on which a surrender can operate (*l*). Should the lord, indeed, accept such surrender, (or at least what we must here call such,) and admit the second no-

(*h*) *Cro. Eliz.* 349. *Berry & Greene. Co. Copyh* s. 39. *Tr.* p. 87.

(*i*) See *Watk.* No. cxxxviii. to *Gilb. Ten.* p. 460.

(*k*) See *ante*, p. [94.] and *Cro. Eliz.* 349. *Berry & Greene.*

(*l*) 1 *Brownl.* 143. *Wilson v. Woddell.* [and *vid. supr.* p. [60].]

minee, it should seem to be the better opinion that such admission would be good; though its validity has been controverted (*m*). Yet this would be in support, and not in contradiction, of our position: since it only *implies a prior admission*, and not that an admission was *unnecessary*.

As he has nothing to transfer, so he can Nor forfeit.
have nothing to forfeit*. If he commit felony and be attainted (*n*), or if he commit waste (*o*), no forfeiture will ensue.

(*m*) See *Gilb. Ten.* 275. 281. &c. and *Watk. No.* cxxx. p. 457. and *Cro. Eliz.* 504. *Gyppen & Bunney*, also *ante*, p. [60.]

* By special custom he shall forfeit on not coming to be admitted. See 1 *Roll. Abr.* 562. *Customs* (G.) pl. 5. *Baspool v. Long*, and *Cro. Eliz.* 879. S. C. and *post.* [237] *Sed qd.* is it not the surrenderor who forfeits in such case? See *Carth.* 44-5. Per *Holt* in *King v. Dilliston*, and 1 *Salk.* 386. S. C. and that only *quousque*, 1 *Salk.* 386.

(*n*) See 2 *Wils.* 13 & 16. *Roe d. Jeffereys v. Hicks*.

(*o*) See *Co. Copyh.* s. 59. *Tr.* p. 137. *Sed quære de hoc.* And *quære* also, whether, if a surrenderee in possession by consent, commit waste, and afterwards be admitted, the admittance shall relate back to the surrender, and so make it a forfeiture? Or whether

[102] The surrenderee is now, however, regarded as having such an interest in the premises as may be the object of a devise or assignment.

But he may
now devise
his interest.

Thus if a surrender be made, though out of court, to the use of A. and then A. devise all his lands to B. and die before any admittance be made; yet the copyholds so surrendered will pass (*p*). For the testator had a title in equity to recover them; and, according to *Ashhurst*, J. in the case of *Woollams & Clapham*, the vendor stood seized for him till a legal conveyance could

the surrenderor shall be answerable for it, it being done by a person who occupies by his permission and he continuing tenant? See *Moore*, 49. *pl.* 149. and *Gilb. Ten.* 235. (*d*). If waste be committed, the lord must have a remedy: the surrender must not be turned to his prejudice. It should seem, however, that admission after waste would be a dispensation.

(*p*) 3 *Chanc. Rep.* 4. *Davies & Beversham*. *Nels. Ch. Rep.* 76. S. C. 2 *Freem.* 157. S. C. and see 1 *Dunf. & East*, 601. S. C. cited. See also *Roe d. Noden v. Griffiths*, 4 *Burr.* 1952. 1 *Just. Blackst.* 605. and 1 *Ves. Jun.* 254.

be made: the surrenderor being considered as a trustee for the surrenderee (q).

But an heir cannot devise without admittance: for he has more than an equity. His interest may be surrendered on satisfaction of the fine (though by the way such satisfaction of fine implies an admittance and acknowledges its necessity); unless, therefore, the heir surrender to the use of his will, his interest will not pass by his devise (r).

So if a surrender be made, the surrenderee may assign his interest, and the lord [103] Or assign it. shall be compelled to admit (s).

(q) See 1 *Durnf. & East*, 601-2. *Holdfast d. Wooliams v. Clapham*.

(r) See 1 *Strange*, 487. *Smith v. Triggs*, and 1 *Atk.* 388. *Hawkins v. Leigh et al.* Ancestor dies,—heir makes his will,—and afterwards is admitted, and surrenders to the use of will:—Q. Shall the lands pass? Had he not been admitted they clearly would not. *Smith v. Trigg*. But I am of opinion that the admission shall relate to the death of the ancestor.

(s) See 2 *Durnf. & East*, 484. *The King v. Lord of the Manor of Hendon*, and *Gilb.* 285. and *Watk.* No. cxxxl. p. 458. and see *post.* [294]

But his admission shall relate to the date of the surrender.

But although the surrenderee has no estate in the premises till actual admission, yet such admission, on being actually made, shall relate to the surrender and operate as from its date (t).

So soon as the surrender is made, so soon is the property bound*: and from that time shall the estate be deemed in the surrenderee by relation, on the admission being actually made.

Should the surrenderor die in the interim, *i. e.* between the surrender and admission, he would, indeed, die seized of the premises; yet it would not be of an absolute, but of a defeasible estate of inheritance; and consequently, though his heir would take

(t) 1 *Salk.* 185. *Benson v. Scott.* See *post.* ch. 6. and 5 *Burr.* 2785. 2787. *Vaughan d. Atkins v. Atkins.* Disseisee devises and then re-enters—good. See *Powell on Devises*, 185, &c. 4 *Burr.* 1691. Grant before attornment—then attornment made—grant good. *Viner, Relation*, (B.) pl. 4.

* [And on a surrender of copyholds, therefore, for securing an annuity, the *admittance* of the surrenderee, though it immediately ensue, need not be memorialized. 1 *Price*, 38. *Doe d. Naylor v. Stephens et al.*]

by descent, and his widow be entitled to dower, yet, on the admission of the surrenderee, would such estate be defeated; and, of consequence, the descent and title to dower would be defeated also (u).

And, on the other hand, should the surrenderee die before admission, his heir would be entitled to admission; and when admitted would be in by descent: and the widow of the surrenderee shall have her freebench (w). [104]

So, on such admission, all mesne acts of the surrenderor (x) and of the lord* would be defeated, and those of the surrenderee effectuated and confirmed.

In ejectment, therefore, such surrenderee may, after admittance, lay his demise in the

(u) See *ante*, p. [86.] *Carth.* 275. *Benson & Scott.* 3 *Leo.* 385. S. C. 1 *Salk.* 185. S. C. 12 *Mod.* 49. S. C. 5 *Burr.* 2764. 2787. *Vaughan d. Atkins v. Atkins.*

(w) See *Gilb. Ten.* 220. 288. 5 *Burr.* 2764. *Vaughan d. Atkins v. Atkins.*

(x) *Carth.* 276. *Benson & Scott.*

* 2 *Saund.* 422. *Granth. v. Copley et al.*

interim(y), and recover the mesne profits from the time when the surrender was made(z).

If one joint-tenant surrender to the use of his will, his devisee shall take: for the joint-tenancy would be severed from the time of the surrender(a).

If a copyholder surrender to the use of himself for life, with remainders over; and the ultimate limitation be to himself and his heirs; and *afterwards*, surrender to the use of his will, and actually execute such will; and *after* such surrender and will made, he be admitted on the *former* surrender, it will be no revocation of his will; but his admittance shall relate to the time

(y) 1 *Durnf. & East*, 600. *Holdfast* d. *Woollams* v. *Clapham*. [An admittance of the surrenderee before trial, will maintain ejectment brought by him before admittance, upon a demise laid between the time of surrender and admittance. 16 *East*, 208. *Doe* d. *Bennington* v. *Hall*.]

(z) See 2 *Wils.* 15. *Roe* d. *Jeffereys* v. *Hicks*.

(a) *Cro. Jac.* 100. *Porter* v. *Porter*. *Co. Lit.* 59. b. 1 *Brownl.* 127. *Allen & Nash*.

of such former surrender, and so be *prior* to the will (b).

Again, as the commissioners of a bankrupt are authorized by statute to convey his copyhold estates by bargain and sale enrolled without the intervention of a surrender; the admission of the vendee shall have a similar relation, and, therefore, it may not be improper to notice it here *.

(b) See the case of *Roe d. Noden v. Griffiths*. 1 *Just. Blackst. Rep.* p. 605. and 4 *Burr.* 1952. [But if a copyhold be surrendered to the use of a stranger, a surrender to the use of his will, made by the surrenderee before admission, is absolutely void and of no effect, and cannot be rendered valid by his subsequent admittance. 11 *East*, 246. *Doe d. Tofield v. Tofield*. And see 16 *ibid.* 210. Note, also, that if the devisee of a copyhold or customary estate, which had been surrendered to the use of the will, die before admission, his devisee, though afterwards admitted, cannot recover in ejectment; for such admittance has no relation to the last legal surrender; but the legal title remains in the heir of the surrenderor. 7 *East*, 8. *Doe d. Vernon v. Vernon*.

* And see 43 *Geo. 3. c. 99. s. 52. as to Collectors*.

On the vendee's admittance, he shall be in from the date of the bargain and sale. Till such bargain and sale be executed the copyhold cannot be supposed to pass from the commissioners; but to the time on which it is executed shall the subsequent admission relate: and consequently, the widow of the bankrupt, in case the bankrupt die after such bargain and sale, and before the admission of the vendee, shall not be entitled to her freebench; but her freebench, and all mesne acts of the bankrupt, shall be avoided on such admission being made(e).

We have already seen that the surrender is now only the formal mode of transfer, containing the designation by the tenant of the person he wishes to succeed him in the tenancy. The copyholder has a right to nominate whom he pleases for that purpose, (except indeed as to those persons who are legally incapacitated to take): and the lord

(e) See *Sir Wm. Jones*, 451. *Parker v. Bleake*, and *Cro. Car.* 568. S. C.

is bound to admit such nominee: he is compellable by decree in equity, and by mandamus at law (*f*). He is merely an instrument: no interest, no estate, passes to him by such surrender: he has only a power to admit according to the directions of the surrenderor. He cannot vary, nor charge, nor any way affect the estate or interest about to be transferred.

Lord is compellable to admit according to the surrender.

[106]

If he admit otherwise, the surrender shall control it. And the surrenderee shall be in by the surrenderor, and not by the lord (*g*).

And the surrenderee shall be in by the surrenderor.

As to this latter position, indeed, it has been declared in some books, that the surrenderee shall be in by the lord, and not by the surrenderor (*h*): but we may justly say

(*f*) See *ante*, p. [61-2.] and *post*. ch. 6. Of Admission.

(*g*) *Co. Copyh.* s. 41. *Tr.* 92. 3 *Burr.* 1542. 4 *Burr.* 1961. 5 *Burr.* 2786. [And *vid. infra*, p. [282-3.]]

(*h*) 1 *Roll. Abr.* 627. *Disc.* (I.) pl. 9. 1 *Lord Raym.* 627. and 1 *P. Wms.* 17. *P. Holt*, C. J. in *Fisher & Wigg.* 2 *Ves.* 257. *P. Hardwicke*, C. in *Rigden & Vallier.*

with Lord *Mansfield*, that such declaration "is contrary to truth and to all the authorities (i)." But we shall treat more at large on these points in the chapter on Admission.

Description
of the surren-
dere.

We come now to the consideration of the description of the person to whose use the surrender is to be made: and as the end of such description is the ascertainment of the person, if the description be such as to answer that end, if from the description given the person may be ascertained, it is all that is requisite.

[107]

For it is not necessary, says Sir *Edward Coke*, that, upon surrenders of copyholds, the name of the party to whose use the surrender is made, be precisely set down; but if by any manner of circumstance the grantee may be certainly known, it is sufficient, and therefore a surrender made to the Lord Archbishop of Canterbury, or the Lord Mayor of London, or the high Sheriff of Norfolk, without mentioning either the

(i) 5 Burr. 2786. in *Vaughan d. Atkins v. Atkins*.

christian name or surname, is good enough, and certain enough; because they are certainly known by this name, without farther addition. So, if I surrender to the use of the next of my blood; to the use of my wife; to the use of my brother or sister, having but one brother or one sister; these surrenders are good without any additions, because the grantee may certainly be known by the words.

If I surrender to the use of my son W. having more sons than one of that name; yet by an averment this incertainty may be helped(k).

(k) And see 5 Co. 68. b. [Collateral circumstances may also be called in to relieve uncertainty: as in a case where *John Lealand* surrendered to the use of *Joseph Lealand* and *John Lealand his son*, for their lives and the life of the survivor, remainder to the heirs of the body of the *said John Lealand, son of Joseph Lealand*, remainder to the right heirs of the *said John Lealand*; it was held, that the ultimate remainder was meant for the right heirs of John the surrenderor; any uncertainty that might have arisen from a similarity of names being precluded, as well by the circumstance of John the surrenderee being before described with the addition of *the son of Joseph*, as by that of the mani-

So, if I surrender to the use of him who shall come next into St. Paul's after such an hour; whose fortune soever it is to come first, the lord must admit him, and I shall never avoid it. The same law is, if I surrender to the use of him, that I. S. shall nominate, or that I myself shall nominate, to the lord at the next meeting (1).

[108] But if I surrender to the use of my cousin or my friend; this is so general and so incertain, that no subsequent manifestation of my intention can any way strengthen it.

fest futility of giving John the surrenderee an estate tail, and afterwards a fee in succession. Supposing, however, that the intention of the surrenderor could not in this case have been ascertained, it would have been sufficient to support an ejectment for his right heir to have shewn that it was quite uncertain on the face of the surrender for which of the John Lealand's right heirs the ultimate remainder was designed: for in order to defeat his title, it must have been distinctly made appear, that such ultimate remainder passed out of the surrenderor. See 9 *East*, 405. *Roe d. Hucksall and others v. Foster*, and *supra*, p. [95.] note (n).]

(1) So a person may surrender to such use as the lord shall name, *Lit. Rep.* 26. or as A. shall by will appoint. See 2 *Vern.* 583. *Otway v. Hudson*.

So, if three persons surrender to the use of three or four of St. Dunstan's parish, not naming the parishioners by their names; this surrender is utterly void.

And so, if I surrender in the disjunctive to the use of I. L. or I. N. this is insufficient for the incertainty (m).¹

Again: as to the limitation of the use with respect to the creation of estates, we must remark, that the same words are, generally speaking, necessary to the creation of an estate in fee or in tail as are requisite to create such estates at common law (n).²

Limitation of estates, by what words.

For, in these cases, at least, a surrender is to be considered as a common law conveyance, and is not entitled to the same favourable construction as a will. And, therefore, according to the doctrine of Lord *Kenyon*, in the case of *Wright v. Kemp* (o), un-

(m) *Co. Copyh.* s. 35. *Tr.* 80. 82.

(n) *Co. Copyh.* s. 49.

(o) 3 *Durf. & East*, 473. and see *Lovell v. Lovell*. 3 *Atk.* 11. *Idle v. Cooke*. 1 *P. Wms.* 70. S. C. in *Salk.* *Lord Raymond, &c.* and *Sutton v. Stone et al.* 2 *Atk.* 101.

Heirs.

Heirs of the
body.

[109]

less the surrenderor uses the language which will confer a legal estate, it cannot be conferred. In deeds, certain legal phrases must be used, in order to create certain estates; as the word "heirs," to create a fee; and "heirs of the body," to create an estate tail. But beyond that, affirmed his lordship, I would say, with Lord *Hardwicke*, that there is no magic in particular words, further than as they show the intention of the parties.

Sibi & suis.

But though, generally speaking, the same words are requisite to create certain estates of copyholds as are necessary to the creation of the same estates of freehold lands, yet, by the force of a particular custom, they may be otherwise created: thus, by special custom, an estate of inheritance may be created by the words *sibi & suis*; or *sibi & assignatis*; or the like (*p*). So, in some manors the words, "sequels in right," are used instead of the technical word "heirs";

(*p*) 4 Co. 29. b. *Bunting & Lepingwell. Kitch.*
102. b.

and in others in addition to it; as "to A. Sequels in right.
his heirs and sequels in right."

Again, though on a surrender being made and no use expressed, the law will presume it to be a relinquishment of the surrenderor's interest, and so for the benefit of the lord (*q*); yet, if a surrender be so made, such presumption may be rebutted by a subsequent act, or precluded by the particular custom of the manor. No use expressed, but explained by admission.

Thus a custom for the lord to grant in fee, where there is no use expressed, is good (*r*). So if no use be expressed and the surrenderor accept a new admittance; the surrender shall be intended to have been originally made to such use as is specified in the admittance, and the presumption that it was for the benefit of the lord shall be rebutted by this explanatory act (*s*).

If a surrender be made to the use of a [110]

(*q*) *Ante*, p. [92.]

(*r*) *Cro. Eliz.* 392. *Brown v. Foster*.

(*s*) Cases at the end of *Poph.* 125. *Brook's case*.
2 *Roll. Abr.* 67. *Grants*. (K.) pl. 18. S. C.

To A. generally he shall take only for life.

stranger generally, and there be no special custom prescribing the estate he is to take, nor any explanatory act to enlarge the estate, he shall have it only for his life (*t*).

Surrender to be construed as a conveyance at common law.

There is, indeed, a case which has been frequently acknowledged as an authority with respect to the construction of a surrender, which appears difficult to reconcile with the doctrine before advanced, that a surrender is to be construed as a conveyance at common law: it is that of *Fisher* and *Wigg* (*u*).

Case of *Fisher* and *Wigg* examined.

The point in that case was, whether a surrender to the use of A. B. and C. and their heirs *equally to be divided* between them, &c. should create a joint-tenancy or a tenancy in common: and it was determined by *Turton* and *Gould*, Justices, against C. J. *Holt*, that it should be a tenancy in common.

(*t*) *Co. Lit.* 59. b.

(*u*) 1 *Lord Raymond*, 662. 1 *P. Wms.* 14, &c. and see 1 *Wils.* 341. *Cowp.* 660. 2 *Ves.* 256-7. 3 *Atk.* 734.

And Lord *Hardwicke*, in the case of *Rigden* and *Valier* (*w*), expressed a greater satisfaction with the arguments of the two justices than with those of Lord *Holt*. Though he seemed, in that of *Lovell* and *Lovell* (*x*), to be of Lord *Holt's* opinion, that a surrender shall be construed as a deed.

Now, it is laid down by Lord *Hardwicke* [111] himself (*y*), that in conveyances at common law, the words, *equally to be divided*, will *not* make a tenancy in common. If a surrender, therefore, is to be construed as a conveyance at common law (*z*), such words cannot make a tenancy in common in a surrender. A surrender must either operate as a conveyance at common law, or not as a conveyance at common law; if it *does* operate as a conveyance at common law, then the estate must be in joint-tenancy.

A distinction, indeed, has been drawn,

(*w*) 3 *Atk.* 734. and see 2 *Ves.* 256-7.

(*x*) 3 *Atk.* 11.

(*y*) 1 *Ves.* 166. in the case of *Stone v. Heurtly*, and 2 *Ves.* 257. in *Rigden v. Vallier*.

(*z*) See *ante*, p. [99.]

with respect to conveyances at common law and deeds to uses. And Lord *Hardwicke*, in the case of *Rigden* and *Vallier* (a), drew a further distinction between words of *limitation* and words of *regulation or modification* of an estate. But, then, it is observable, he confined this distinction to *deeds to uses*; *deeds at common law*, therefore, stand unaffected; and a surrender is to be construed *as a deed at common law, and not as a deed to uses*. In one thing, said Lord *Hardwicke*, *Holt* was certainly right, that a surrender of copyhold lands to use is *not* to be considered on the foot of an use or trust (b). If, therefore, a surrender is not to be considered as an instrument creating an use, but properly and strictly as a common law conveyance, this distinction does not apply: and, consequently, such surrender must receive the same construction as a deed at common law; and consequently, also, if the words "to be *equally divided*," will *not* make a tenancy in common in a conveyance at common law, they

[112]

(a) 2 *Ves.* 257.

(b) 2 *Ves.* 257.

cannot, according to the doctrine laid down even by Lord *Hardwicke* and other opponents of Lord *Holt*, themselves, create a tenancy in common in a surrender. And, therefore, either the case of *Fisher* and *Wigg*, though so repeatedly affirmed to be authority, must be given up as no authority at all, or we shall not be warranted in laying it down as law, though it incontrovertibly has been laid down as law, that a surrender is to be construed as a common-law conveyance.

The next matter to be considered, with respect to the construction of a surrender, is the *habendum*. It having been the subject of much controversy, whether a person who was not named but in the *habendum* should take.

When a person named only in the *habendum* shall take.

And as to the *habendum* also, several distinctions have been made: as whether such *habendum* be in an admission on a surrender or on a voluntary grant: whether there be any custom or not in the manor prescribing, or at least warranting the form: and whether any one be named before the *habendum*, and then the *habendum* be to

such person with others, or whether there be no person before named.

[113] If a surrender, therefore, be made without expressing any use, and afterwards the surrenderor is admitted, *habendum* to him and his wife and the heirs of their bodies, the wife shall take an estate-tail as well as the husband: for as the surrender was general, the subsequent admission shall enure as an explanation of the intent of the surrenderor, who shall now be considered as having surrendered to the use of himself and his wife, and their heirs, &c. according to the admittance (c).

But if the lord make a *voluntary grant* to a person, *habendum* to him and his wife and the heirs of their bodies; the wife shall *not* take: and that not only because she is not named in the premises, but also because there is no preceding surrender to direct or guide

(c) 2 *Roll. Abr. Grants*, p. 67. (K.) pl. 18. *Brookes v. Brookes*.

the construction of such grant, by which only the estate could pass (*d*).

Again: a particular form of admission or grant may be good, in some manors, from established usage, which, without such usage, would not be good. Thus it was observed by *Holt*, C. J. in the case of *Fisher* and *Wigg* (*e*), that the resolution before noticed in *Rolle* (*f*), was founded upon the custom of the manor. And he affirmed, that he knew manors where grants had been made to R. *habendum* to A. B. C. and D. where the first named took the whole for his life; and so every one in remainder in [114] their order (*g*).

For where long usage has established a peculiar form, that form should be complied with. And we find it noticed in *Crook's James*, that, with respect to this instance

(*d*) *Ibid.* pl. 19. See also *Cro. Eliz.* 323. *Downs v. Hopkins*:

(*e*) 1 *Lord Raym.* 627.

(*f*) See the last page.

(*g*) 1 *Lord Raym.* 627.

of the *habendum*, in many manors there were no other forms of grant or limitation (*h*). And, in the case of *Downs v. Hopkins*, in *Crook's Eliz.* (i) such *habendum* is said to be common in copies. And, accordingly, *Holt* said, in the case of *Fisher v. Wigg* (*k*), that if a custom prescribe a certain mode to pass estates, and many grants have been made in the manner so prescribed, such grants will be good.

The next distinction is, whether any person be named before the *habendum* or not: for if there be, as to A. *habendum* to A. and B.; B. it is said, shall not take (*l*), unless it be by a particular custom authorizing such mode of grant; as in the instance before given, to R. *habendum* to A. B. C. and D. where the first named took the whole for his life, and so every one in remainder in their order (*m*). But we may observe, that

(*h*) *Cro. Jac.* 434. *Brooks v. Brooks et al.*

(*i*) *Cro. Eliz.* 323.

(*k*) 1 *Lord Raym.* 627.

(*l*) See 2 *Roll. Abr.* 67. Grants, pl. 19, 20, 23. and see *Hob.* 313. *Windsmore v. Hobart.*

(*m*) 1 *Lord Raym.* 627. and *ante*, p. [113.]

a person may take by a deed at common law *by way of remainder*, though he be not [115]
named in the premises with him to whom the estate is first limited (n).

If the *habendum* be to A. and B. and neither be named in the premises, they shall both take (o): and this, perhaps, may hold as to a deed (p).

An estate cannot arise by implication in a surrender, any more, it is said, than in a deed at common law; as to the use of the second son of the surrenderor, after the death of the surrenderor and his heirs: for the surrenderor shall not have an estate tail (q).

Yet such a limitation may be good by

(n) *Cro. Jac.* 563. *Greenwood v. Tyler*.

(o) See 2 *Roll. Abr.* 67. pl. 18. *Brookes v. Brookes*.
Cro. Jac. 434. S. C. and see *Gilb. Ten.* 259.

(p) See *Gilb. Ten.* 259.

(q) 1 *Brownl.* 127. *Allen & Nash. Cro. Car.* 366.
Seagood v. Hone & Ux. and see *Gilb. Ten.* 259, 60.
Fearne, 416. 418.

reason of the special custom of a particular manor, according to *Hollsworth's case* (r).

Repugnant
clause.

If, on a surrender, the uses be at first well limited, and afterwards a repugnant clause be inserted, such clause shall not vitiate the preceding limitations, but be rejected as void and nugatory (s).

Of a surren-
der to com-
mence in fu-
ture.

[116]

Fee upon a
fee.

Whether a surrender may be made to commence *in futuro*, and whether a fee may be limited upon a fee in a surrender of copyholds, will be considered in a subsequent chapter (t).

Surrenders on
condition.

A surrender may be made on condition; and this is most usually done by way of mortgage. The condition should always immediately follow the surrender, and be carefully inserted in the court rolls; and it is then thus entered: the surrender is made

(r) *Clayton's Rep.* 21. ca. 36.

(s) *Cro. Car.* 367. *Seagood v. Hone & Us.* and *Gilb. Ten.* 259.

(t) Ch. 5. Of Remainders, Executory Interests, and Trusts.

in the general form, "to the use of A. B. and his heirs," with a proviso to the following effect:

"**PROVIDED NEVERTHELESS, and upon** Entry on the roll. condition, that if the said C. D. his heirs, executors, administrators, or assigns, shall and do well and truly pay, or cause to be paid, to the said A. B. his executors, administrators, or assigns, the full sum of — of lawful money of Great Britain, with lawful interest for the same, on the — day of —, which will be, &c. without any deduction or abatement whatsoever, for, or in respect of any taxes, rates, charges, assessments, or impositions whatsoever, then the above surrender to be void, else to be and remain in full force and virtue."

The proviso or condition is often con- Defeasance. tained in a deed entered into at the time the surrender is made; which deed is termed a *defeasance*. But this mode should never be resorted to when possible to be avoided. As the surrender is absolute on the rolls, should the defeasance, a separate instrument, be lost, the proof of the condition might be difficult, and frequently impossi- [117]

ble. Besides, the title to the lands should always appear on the court rolls of the manor, and not be dependent on any private deeds or agreements. If a defeasance be entered into, it ought always, for this reason, to be entered on the rolls.

Delay of admittance in case of mortgage.

As the surrenderor continues tenant to the lord till the admission of the surrenderee*, and as the surrender is made, in the case of a mortgage, only as a security for the money advanced, the admission is usually delayed. Or, if the surrender be made out of court, it is frequently suffered to become void for want of a timely presentment, when a new surrender is taken (u).

Acknowledgment of satisfaction, and vacation of surrender.

In case the money be paid within the time prescribed by the condition, the sur-

* 5 *East*, 130. 8 *Ves. Jun.* 30.

(u) See 2 *Ves.* 300. *Fawcett v. Lowther*. [Copyhold estates surrendered to the use of mortgagees, but they had not been admitted: the mortgagor devising them must surrender to the use of his will. 8 *Ves. Jun.* 30. *Kenebel v. Scrafton*. S. P. 5 *East*, 132. *Doe d. Shewen, wid. v. Wroot*.]

renderee acknowledges the repayment and authorizes the steward to vacate the surrender. Such acknowledgment of satisfaction, the warrant to vacate, and the actual vacation of the surrender are then entered on the rolls; on which the surrenderor becomes possessed of his former estate, and is in *in statu quo prius*, without any re-admission or fine(w).

If the acknowledgment be made in court, let the homage find the surrender in the usual way, and then say, Acknowledgment in court.

“AND NOW AT THIS COURT came the [118]
said C. D. in his proper person, and acknowledged to have received full satisfaction and payment of the said sum of —, Entry.
and all interest for the same, according to the form and effect of the said surrender. *And thereupon* the said A. B. and C. D. prayed that the said surrender might be vacated; *And* the said surrender is vacated accordingly.”

(w) *Cro. Eliz.* 239. *Simonds v. Lawnd.*

Acknowledg-
ment before
the lord.

If it be made out of court, before the
lord or steward, say,

“BE IT REMEMBERED, that on the ——
day of ——, the within-named C. D. came
before me —— (lord or steward of the
manor of Fairhurst, *as the case may be*); and
acknowledged to have received of the within-
named A. B. all principal and interest se-
cured to him by the within surrender: and
requested that the said surrender be vacated
accordingly.”

Taken, &c.

C. D.

E. F. lord or steward, of, &c.

The caption
certified.

This memorandum should be endorsed
on the copy of the surrender, and signed by
the lord or steward, and the party acknow-
ledging satisfaction: and at the next court
it should be presented;—thus,

Entry on the
roll.

“AND ALSO at this court it is certified,
by the said steward, and thereupon the ho-
mage present, that out of court, and since
the last court, C. D. one of, &c. came before
him, the said steward, in his proper person,

and acknowledged," &c. (*as in the memorandum*) "Of which acknowledgment and request a *memorandum* was duly made, and signed by the said C. D. and the said steward, and now exhibited in open court; therefore, the said surrender is accordingly vacated and annulled."

[119.]

If the acknowledgment cannot be made in court, or before the lord or steward, the acknowledgment and warrant (on the requisite stamp) may be thus :

"I, C. D. of, &c. hereby acknowledge to have this day received of A. B. &c. the sum of — in full satisfaction and discharge of all principal and interest secured to me by a conditional surrender, made by the said A. B. of certain copyhold premises by him then held of the manor of Fairhurst, to my use, at a court held on the — day of — last: and therefore I request and authorize you, as steward of the said manor, to vacate such surrender accordingly. *Witness* my hand, &c."

Warrant to vacate.

To E. F.

C. D.

Steward of the manor
of Fairhurst, in the
county of —.

Such is the formal mode of vacating a conditional surrender; but such formal mode is by no means a matter of necessity. The condition is express; that on payment of the money the surrender shall be void. On the money, therefore, being actually paid within the prescribed time, the surrender becomes void *ipso facto*. An acknowledgment of satisfaction by the mortgagee is sufficient: and such acknowledgment is generally written in the margin of the roll immediately against the surrender, and signed by the surrenderee.

[120]

Release of
condition.

If the surrenderee has been regularly admitted, and the condition be not forfeited, yet the surrenderor may release the condition by deed. For the surrenderee, on his admission, is become tenant to the lord, and the interest of the surrenderor may be relinquished by his own act: hence no fine is payable on that event (x).

Release of
equity of re-
demption.

So, on breach of the condition, the sur-

(x) *Cro. Jac.* 36. *Hull* and *Sharbrook*, and *post.* ch. 7. Of Fines.

renderor may release his equity of redemption; and no fine will in consequence be due (y).

And here we may observe, that the surrenderee of a copyhold is an assignee within the statute 32 Hen. 8.; and may, therefore, take advantage of a condition broken (z). So, when such condition is forfeited, the equity of redemption shall descend to the customary heirs or sequels of the surrenderor, as the legal estate would have done (a).

Who may
take advantage
of the
condition.

If the surrenderee be admitted, and the condition broken, the estate becomes absolute

On condition
broken, the
estate be-

(y) See *post.* ch. 7. Of Fines.

(z) *Bull. Nisi Prius.* 161. *Watk.* No. lxxxiii. to *Gillb. Ten.* p. 429. and the authorities there referred to.

(a) 2 *Ves.* 300. *Fawcet* and *Lowther*. On breach of the condition, the lord may insist upon the admission of the mortgagee. See 2 *Vern.* 367. *Tredway v. Fotherly*. But *quære*. For he can't compel the surrenderee to be admitted without special custom. See *Baspool v. Long, &c.* Mortgagee may bring his bill for foreclosure before admittance. 2 *Atk.* 101. *Sutton v. Stone*.

[121] lute; and, in case the money be afterwards paid, there must be a re-surrender by the former surrenderee; and a regular admission of the original surrenderor.

comes absolute; and a re-surrender will give a new estate.

The estate is now changed. On the breach of the condition the old estate was gone: on the re-surrender, the person to whom it is made takes a new estate. If the former estate, the subject of the first surrender, had been derived *ex parte materna*, yet the new estate received by the re-surrender will be taken by purchase, and shall descend to the *paternal* heirs(*b*). Taking therefore a new estate, he must necessarily be re-admitted, and pay a fine(*c*).

Remainders. A copyholder may surrender to the use of a particular person with remainders over to others: but the doctrine of Remainders will be considered in a future chapter(*d*).

(*b*) See 12 *Mod.* 49. *Benson & Scott*, and *Herman & Ux. v. Morgan*, now reported in 7 *Durnf. & East*, 103.

(*c*) See *post.* chap. 7. Of Fines.

(*d*) Chap. 5.

The doctrine of Entails of Copyholds also, Entails.
will be treated of at large, under that title (e).

So, a copyholder may surrender to such Surrender to the use of a will.
uses as he shall by will appoint, without a special custom for that purpose*: and, indeed, if a special custom were alleged to restrain him from doing so, it could not be supported (f).

By special custom, copyholds may be devised without such surrender (g); but by the [192]
general law of copyholds a surrender is absolutely essential (h). The statutes of *Henry*

(e) Chap 4.

* [And accordingly, in *Church v. Mundy*, 15 *Ves. Jun.* 396. on the question of supplying a surrender in favour of creditors, the LORD CHANCELLOR said, that the court would hold that there might be a surrender to the use of the will, though no instance could be found upon the records of the manor. See *infra*, p. [139].]

(f) 3 *Bro. Chanc. Cas.* 286. *Pike v. White*.

(g) *Co. Entries*, 124. b. *Hills v. Hills*. Manor of Bewdley in Worcestershire, and *Carter*, 71. *Smith v. Paynton*. *Littlel. Rep.* 26. cites *Wrot's case*.

(h) *Co. Copyh.* s. 36. *Tr.* 83. 4 *Co.* 24. b. *Murrell and Smith*.

the Eighth and *Charles* the Second, relative to wills, do not affect them (i).

V. d. however 55 Geo 3 c 192.

Entry of on
the roll.

Such surrender is made in the common form; "to such uses, ends, intents, and purposes," or "to the use of such person or persons, and for such estate or estates, ends, intents, and purposes, as the said A. B. in and by his last will and testament, shall direct, limit, or appoint."

The estate re-
mains in the
surrenderor.

If a copyholder surrenders to the use of his will, the estate, notwithstanding, remains in him and not in the lord (k), and, therefore, he may surrender it again to a stranger without a formal revocation of the surrender to his will (l).

Part unde-
vised will de-
scend.

So, if he die without a will, or, making a will, devise only a particular interest, as to B. for life, or in tail, the whole in the one

(i) 2 Atk. 37. *Tuffnell* and *Page*. 1 Ves. 225. *Attorney General v. Andrews*. Harg. N. (1) and (3) to Co. Lit. 111. b.

(k) 4 Co. 23. a. *Gravener* and *Ted*.

(l) *Ante*, p. [94.] Cro. Eliz. 442. *Fitch* and *Hockly*.

case, and the undisposed of part in the other, will descend to his customary heirs (*m*). And so also, if a copyholder surrender to the use of his will and devise to his customary heir, and die; the heir shall be in by descent (*n*); for when an heir has that . [123] estate devised to him which he would have taken without such devise, he shall take by descent, whether it be a freehold or a copyhold estate. In such case, therefore, the devise is inoperative, and the heirs shall take as if there had been no devise at all. And if there had been no devise at all, the estate continuing in the surrenderor would have descended, as if no surrender had been made: for such surrender and testamentary declaration of uses will *not* make a new estate (*o*).

If a copyholder surrender certain lands to Exchange.

(*m*) *Cro. Eliz.* 442. *Fitch and Hockly*, and *ante*, p. [94.]

(*n*) *Strange*, 487. *Smith v. Trigg*, *Lutw.* 797. *Clark v. Smith*. and case of *Hurst v. Morgan*. *East.* 28 *Geo.* 2. 1755. in *Chanc.* and on *Certif.* from *B. R.* 27 *Nov.* 1759. *MS.*

(*o*) See *ante*, p. [95.]

the use of his will, and then exchange those lands for others; the lands so taken in exchange must be surrendered to the use of his will, or they cannot pass (*p*).

Ultimate limitation of the old estate.

But, if a copyholder seised in fee, surrender to the use of his will, and afterwards surrender to particular uses with the ultimate limitation to his own right heirs, he shall be in of his old estate; and may devise the reversion without any fresh surrender or admission (*q*).

[124]

If a copyhold, however, descend to the customary heir, such customary heir must surrender it to the use of his will, or he cannot devise it (*r*).

An equity may be devised without a surrender.

But where a person has only an equity in

(*p*) 1 *Bro. Chanc. Cas.* 588. *Frank v. Standish*, in *Scac.* cited in *Not.*

(*q*) 1 *Fearne's Cont. Rem.* 90. *Thrustout d. Gower v. Cunningham*, and 2 *Just. Blackst. Rep.* 1046. S. C. [And *vid. supr.* p. [94.] note (*h*).]

(*r*) See *Str.* 487. *Smith v. Trigg*, and *ante*, p. [102] [121.]

copyholds, such equity will pass by devise without a surrender: for of an equity no surrender can be made: nor can the devisee require any admittance, as he will not become tenant to the lord (s).

Yet this is to be understood of such an equitable interest as would have been devisable had it been of freehold lands; thus, if it be an equitable estate tail, it will not pass. For, as in the case of an equitable estate tail in freehold lands, a fine* or recovery is requisite in order to destroy it (t), though it hath been formerly held otherwise (u); so in that of copyholds, the entail must be first docked, as if it were a legal entail: and the estate will not pass merely by the devise (w).

If it be of a
devisable
estate.

(s) See 3 Atk. 73. *Carr v. Ellison*. 1 Bro. Chan. Cas. 480. *Macnamara v. Jones*. 3 P. Wms. 360. *King v. King*, and Mr. Cox's note (1) and post.

* 1 Cruise, 190.

(t) 1 Bro. Cha. Ca. 72. *Boteler v. Allington*, and *Salvin v. Thornton*. cited Mr. Cox's note (2) to 1 P. Wms. 91. *Legate v. Sewell*.

(u) Preced. in Chanc. 228. *Woolnough v. Woolnough*.

(w) 1 Hen. Blackst. 446. 461. *Roe v. Lowe*.

if a surrender is made by the tenant of a copyhold estate, the estate will pass by devise without a surrender: for of an equity no surrender can be made: nor can the devisee require any admittance, as he will not become tenant to the lord (s).

Accession of
the legal fee.

But, if a copyholder, having an equity only, (as if he be a surrenderee,) make his will and devise; and after making his will, he take the *legal* estate by descent, and then die; yet the equity will, it seems, be bound. Had the legal fee not descended to him, the equity would certainly have passed (x). And it has been determined, that, as to *freeholds*, the accession of the *legal* interest will be no revocation of a will; but the person having the legal fee shall still be subject to the equity (y).

Now where the rights and emoluments of the lord are not affected, there is no reason why copyholds should not be within the same rules. An uniform standard should be fixed; and copyholds follow closely on the rules of freeholds (z).

(x) See the case of *Davy v. Beversham*, or *Beardsham*, *ante*, p. [102.]

(y) See *Parsons v. Freeman*. 1 *Wils.* 308. 3 *Atk.* 741. 804. and *Dougl.* 718. *Doe v. Pott*. 3 *P. Wms.* 309. 1 *Ves. Jun.* 254-5.

(z) See as to *Recoveries*, last page, and 5 *Durnf. & East*, 104. *Roe d. Crow v. Baldwere*. Resulting Use, *ante*, p. [95.] [98.]

In this case the lord would not be injured. The *legal* fee, not passing by the will, descends to the heir of the testator. The person having the *legal* fee is still tenant to the lord*. And the *legal* estate can only be transferred by surrender and admittance. By the conveyance of the *equity* the *tenancy* is not altered.

The Court of Chancery would, therefore, I conceive, make the person having the legal interest surrender it according to the disposition of the equity.

By special custom, it is said, a feme covert may surrender to the use of her will with the assent of her husband (a).

Who may
surrender to
the use of a
will.

[126]

But, if a feme sole surrender to the use of her will, and afterwards marry, it will be

* See 5 East, 132. *Doe d. Shewen v. Wroot*, as to a surrender to the use of a mortgagee, and no admittance under it. The surrenderor cannot devise, having the *legal* estate.

(a) See *ante*, p. [63,] &c.

a revocation, or at least a suspension of the surrender (b).

Joint-tenant. A joint tenant may surrender to the use of his will: and though such surrender be made out of court and not presented till after his death, yet the jointure will be severed; and the devise of his moiety will be good (c).

Presentment of a surrender to a will. As to the presentment of a surrender to the use of a will, when made out of court, see *ante*, p. [84].

The surrender only embraces what the surrenderor has at the time of such surrender made. As the testamentary instrument operates only as a declaration of the uses of a surrender, and as a person cannot surrender what he has not, it follows that, as such testamentary instrument cannot have any effect where no such surrender has been made, so no such surrender can be made, when

(b) Heir before admission, *post*. [245.] Marriage a revocation of the will of a feme sole. See 4 Co. 60, &c. 2 P. Wms. 624. See also 1 Ves. 229. Case cited. C. B. 1747. and Ambler, 627. *George v. —*.

(c) Cro. Jac. 100. *Porter v. Porter*. Co. Litt. 59. b. 1 Brownl. 127. *Allen and Nash*.

there is nothing to convey. A person can only surrender that which he has in him at the time (d): hence no after-purchased lands can pass.

If a person possessed of several copyholds, surrender "*All* his copyhold tenements" to the use of his will, and, after such surrender made, purchase other copyhold lands, and then make his will and devise "*All* his copyhold tenements;" the devise will not operate upon the after-purchased lands. [127]

Hence lands purchased after surrender made, will not pass.

(d) See 3 *Durnf. & East*, 365. *Goodtitle v. Morse*, and 6 *Durnf. & East*. 63. *Doe d. Ibbott v. Cowling & Ur*. In this latter case, A. tenant for life, surrendered all his copyholds in possession, reversion, &c. to the uses of his will. *Afterwards* the reversion in fee descended to him. *After* such descent, A. made his will, and devised all his copyhold estates, &c. The reversion did *not* pass, as it was not in him at the time of the surrender. See also 1 *Anstruther*, 11. *Morse v. Faulkener et al.* And in a case which was subsequently lain before me, where B. tenant for life, surrendered to will, and afterwards purchased the reversion in fee, which was surrendered to him, and to which he was admitted, and *after such purchase*, made his will and devised to C. in fee,—I gave it as my opinion that the estate did not pass by his will.

For, as he could not surrender what he had not at the time of the surrender, the after-purchased lands could not have been included in it; and no subsequent surrender was made.

Nor those
purchased af-
ter making of
the will, tho'
before sur-
render.

And, in order that a devise may operate on a copyhold, it is not only necessary that the copyholder should be possessed of the lands at the time of making such surrender, but also that he be possessed of them at the time of making, or of the republication of the will: thus, if a person having several copyholds make his will, and devise "all his copyhold tenements," or "all his real estate," generally, and then purchase other copyhold lands; and afterwards, surrender "all his copyhold tenements" to the use of his will: the copyhold lands which were purchased after the execution of the will, though before the surrender, will not pass (e).

(e) *Ambler*, 199. 1 *Durnf. & East*, 435. n. (f). *Spring d. Titcher v. Biles et al.* and *Harris v. Cutler*, there cited. But the surrender of after-purchased lands may be so framed as to refer to a disposition already made. As if a copyholder surrenders them to the uses *declared*, or to be declared by his last

But, if a person, having no copyholds at the time, make his will, and devise "all the rest and residue of his estate, of what nature, kind, or quality soever," and then purchase a copyhold estate and surrender it to such uses as he should by his last will appoint; and after such surrender make a *codicil*, reciting and *ratifying* the will; the copyhold estate will pass; for the codicil shall operate as a *republication*, and bring the will to the date of the codicil (*f*).

Codicil and republication.

If a copyholder, seised in fee, surrender [128] to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs; and *afterwards* surrender to the use of his will, and actually execute such will; and, *after* such surrender and will made, he be admitted on the *former* surrender, it will be no revocation

Subsequent admission shall operate by relation and not revoke, but support a will.

will*. *A fortiori*; if he expressly refers to a specific instrument.

(*f*) *Dougl.* 716. n. (2). *Doe d. Pate v. Davy. Cowp.* 158.

* *Cowp.* 130. *Heylyn v. Heylyn.* And see 1 *Ves. Jun.* 486. *Barnes v. Crowe*, and 8 *Ves. Jun.* 286, &c.

of his will: but his admittance shall relate to the time of such former surrender, and so be *prior* to the will (g).

Will made
previously to
surrender.

If a copyholder surrender to such uses as he *shall* by his will appoint; the lands will pass by a will made *previously* to the surrender, if the testator was possessed of them at the time of such will being executed (h).

Testamen-
tary disposi-
tion operates
as an appoint-
ment.

As a testamentary disposition of copyholds is only a declaration of the uses of the surrender, it operates as an appointment and not as a will (i).

And the ap-
pointee shall
be in by the
surrender.

And, as on a power of appointment being executed, when it relates to common law property, the appointee shall be *in* under, and as if expressly named in, the instrument by which such power is created (k),

(g) 4 Burr. 1952. *Roe d. Noden v. Griffith.*
1 Just. Blackst. 605. S. C.

(h) 1 Durnf. & East, 435. *Spring d. Titcher v. Biles*, in note. And see 8 Ves. Jun. 285.

(i) 1 Bulst. 200. *Semain v. ———*. 2 Ves. 77.
and see 3 Brown. Ch. Ca. 231.

(k) 2 Ves. 78. & 612. 2 Atk. 565. 568. *Cooke v. Duckenfield*, and see 1 Fearn, 99. Butl. n. (1) to Co. Litt. 299. b.

so the devisee or appointee named in the [199]
will or testamentary instrument, shall be
in by the surrender as if expressly named.

But as the testamentary instrument is
ambulatory, and not effectual till the testa-
tor's death, if the devisee or appointee die
in the testator's life-time, the appointment
cannot take place (1).

Appointee
dying in tes-
tator's life-
time.

As, therefore, such testamentary instru-
ment is to be considered as an execution
of a power, and not strictly as a will, it is
enough if made pursuant to the directions
of such surrender; and need not be exe-
cuted, as a will is required to be executed,
for the passing of freehold lands*.

What shall be
such a will as
to pass the
copyhold.

If a person, therefore, surrender to such Unattested.
uses as he shall by will appoint, a will,
though attested by two witnesses, or by one
only, or not attested at all, will be sufficient
to pass it (m).

(1) 2 Ves. 77. *Duke of Marlborough v. Lord Godolphin.*

* See 2 Ves. Jun. 204. *Habergham v. Vincent.*

(m) 2 Atk. 37. *Tuffnell v. Page.* 1 Ves. 225.
Attorney General v. Andrews. 2 P. Wms. 259. *Wag-*

[130] So, where a copyholder made his will attested by *three* witnesses, and afterwards caused such will to be altered, by striking out several devises, and a memorandum to be written, that he had examined, perused, and approved of the will so altered; but did not republish it in the presence of *three* witnesses, but directed it to be written out fairly, and became delirious before it was returned, it was held sufficient, and a surrender decreed (n).

By parol.
Qy. Whether
the 19th sec.
of the 29th
Car. 2. b. 3.
relative to
nuncupative
wills does not
extend to co-
pyholds it be-
ing *general*.

And it should seem that a will by *parol* only would be sufficient for this purpose. A will by *parol* was good as to lands *devisable* by custom before the statute of frauds (o): and in the old writ of *ex gravi querela*, the custom was alleged generally, "to devise by last will." It does not seem probable that a will in writing should be required of a

staff v. Wagstaff. 2 Bro. Chanc. Ca. 58. *Carey v. Askew.* 2 Ves. Jun. 228. 232. *Habergham v. Vincent.* 2 J. Blackst. Rep. 1114. *Roe d. Gilman v. Heyhoe.* [And see 7 East, 299. *Doe d. Cook & Us v. Danvers.*]

(n) 2 Vern. 498. *Burkitt v. Burkitt.*

(o) See Co. Litt. 111. a.

burgess or villein, who were not permitted even to have their children taught to read without a licence from the lord (*p*) till they were enabled by statute (*q*). The surrender of a copyhold is made "to such uses as A. B. shall by his last will appoint:" now I know of no law which says, that such last will must be in writing*. It has been no-

(*p*) See *Paroch. Antiq.* 401.

(*q*) *Stat. 7 Hen. 4. c. 17. An. Dom. 1405.*

* The statute of frauds, (see 2 *Bro. C. C.* 58. *Carrey v. Askew*,) requires all declarations of trusts to be in writing. And see n. 3. to *Co. Litt.* 111. b. But see also 1 *Ves. Jun.* 499, end of the case of *Barnes v. Crowe*, and *Prec. in Ch.* 5. in *Devenish v. Baines*. But note, that although the Stat. of Frauds says, that trusts or confidences may be declared or passed by will in writing, it does not say that this *will in writing* shall be *signed by the testator*, though it so anxiously prescribes the signature in other instances. Before the Stat. it was considered as sufficient that a will of freeholds should be in writing, though it was not written or signed by the testator. See 1 *Siderf.* 315. & 362. and *Comyns. Rep.* 452. *Pow. on Devises.* 30. and 60. And it should seem, therefore, that a declaration or assignment (or transfer) of such trust or confidence, would be good by a will in writing, though the will be not *signed* by the testator. See *Gilb. Rep. in Eq.* 260. 4 *Burn's Eccl. Law.* 106. ["We are now satisfied that a will to direct the uses of a surren-

ticed above, that where lands were devisable by custom, such devise need not be in writing: and it has been remarked also (r), that the statutes of Henry the Eighth and Charles the Second, do not embrace a devise of copyholds. If, therefore, neither the general custom, nor a positive law, nor the particular surrender, require such will to be in writing, what reason can be given why a will by *parol* should not be good?

[131]

Of an equity.

So an equity in copyholds will pass by a will unattested, though such will cannot be considered on the same principle as a will of the legal estate (s).

Of customary lands.

But a devise of *customary* lands, as contradistinguished from copyholds, must be

der of a copyhold, or of a customary estate passing by surrender, is not within the statute of frauds, and needs not be signed, unless such signature be required by the terms of the surrender to the use of the will." *Per* Lord ELLENBOROUGH, C. J. in *Doe d. Cook & Ux. v. Danvers*, 7 East, 299.]

(r) *Ante*, [122].

(s) *Tuffnell v. Page*, as above.

executed according to the statute of frauds; because they do not pass by surrender (t).

If, indeed, a particular mode of executing a will of copyholds be prescribed, and certain ceremonies required by the surrender, such mode must be pursued, and such ceremonies observed, and the particular directions must be complied with, as to such will; for otherwise it will not be an execution of the power.

The will as to form must pursue the directions of the surrender.

If a copyholder, therefore, surrender to such uses as he shall appoint by his last will "to be by him signed, sealed, and published, in the presence of *three* witnesses," his last will must be signed, sealed, and published, in the presence of three witnesses; for otherwise the copyholds shall not pass (u). If it be attested by two witnesses only, it will not be sufficient: though a court of equity may, indeed, under certain circumstances,

If three witnesses are required, it must be so attested.

(t) *Ambl.* 299. *Hussey v. Grills*; and see stat. 29 Car. 2. c. 3. s. 5. See also 1 *Ves.* 230. [and 7 *East*, 299. *Doe d. Cook & Ux. v. Danvers.*]

(u) *Ambl.* 684. *Goodwin v. Kilsha*; and see 2 *Ves. Jun.* 216.

aid such defective execution, as in the case of other powers (*w*).

[132]

Copyholds
pass by a ge-
neral devise,

And where copyhold lands are surrendered to the use of a will, they will pass by a devise of land *generally*; as "all my real estate, &c." notwithstanding there are freeholds to answer the devise (*x*).

(*w*) See *Coffer v. Layer*. 2 P. Wms. 623.

(*x*) 2 Atk. 85. *Tendril v. Smith*. 1 Ves. 226. *Goodwyn v. Goodwyn*. 2 Ves. 164. *Byas v. Byas*. Otherwise if not surrendered. 1 Atk. 387. *Hawkins v. Leigh*. See *Supplem. to Vin.* Vol. 2. *Copyh.* (W. c.) 333-4. and 2 Ves. 164. *Byas v. Byas*. If a copyholder devise all his freehold and copyhold lands, *the copyhold part of which* (it is added) *he had surrendered to the use of his will*, and die seised of some copyholds surrendered, and some not surrendered,—those only which were surrendered shall pass. See 3 Atk. 8. *Gascoigne v. Barker*. 3 Ves. Jun. 191. *Wilson v. Mount*. But if a specific description be given of the premises, the words, "which I have surrendered," &c. may be considered as a mistake, *ibid.* [So also where a testator devised all the residue of his estates as well copyhold as freehold, adding, "the copyhold part thereof having been previously surrendered to the use of my will," and died without having surrendered *any* of his copyhold premises to the use of his will, it was held to be a mistaken description, the copyhold being clearly in-

So, by such general clause, they shall be made subject to debts: as if the will runs "as to all my worldly estate, I desire all my just debts shall be paid." For, by Lord Commissioner *Ashhurst*, in the case of *Coombes v. Gibson*, (y), the doctrine is that where the introductory words make the real estate liable, it shall extend as well to the copyhold as to the freehold lands. The freehold is as unnatural a fund for the payment of debts as the copyhold. It was admitted if there had been no freehold, the copyhold would have been liable. If the freehold had been devised to one person, and the copyhold to another, the freehold might have been first applied." And it was decreed that by such general words both the freehold and copyhold were liable (z).

so they are made subject to debts by a general clause.

tended to pass. 3 *Ves. Jun.* 65. *Rumbold v. Rumbold*.]
 "All my freehold and copyholds," without saying, "which I have surrendered," &c.—All pass. See 3 *Ves. Jun.* 194. [A devise of all copyhold estates, in general terms, unrestrained, passes all copyholds surrendered and not surrendered to the use of the will 10 *Ibid.* 589. *Blunt v. Clitherow*.]

(y) 1 *Bro. Chan. Cas.* *274.

(z) And see also 3 *Bro. C. C.* 257. *Kentish v. Kent-*

Surrender to
will supplied.

But though a surrender is thus essential to the transfer of the tenant's interest in copyholds to a stranger, and the will merely a declaration of the uses of such surrender;

[133] yet, if a copyholder devise his tenements held by copy, without surrendering them to the use of his will, a court of equity will, under certain circumstances, effectuate such devise, by supplying the defect; and compel the heir to surrender the premises according to the testamentary disposition.

But equity will not interfere in a capricious or arbitrary manner. If the necessity

ish, and 3 *P. Wms.* 96. *Harris v. Ingledew.* [Personal estate bequeathed subject to payment of debts, funeral expenses, and testamentary charges; but in case his personal estate "should not be sufficient to discharge the same," then testator charged all his freehold estate with payment thereof, and "subject thereto," gave all his freehold and copyhold estates which he had surrendered or intended to surrender to the use of his will, &c. The copyhold estates held to be charged, on the general principle that, in a doubtful case, the court inclines to the construction in favour of creditors rather than against them; not however inserting or straining words for that purpose. 2 *Ves. & Beames*, 269. *Noel v. Weston.*]

or justice of the case does not demand it, the claimant must be left to his fate; and the heir is not to be disinherited where it would be consistent with justice that he should succeed (*a*).

In cases of moral obligation, as a provision for a wife (*b*) or child (*c*); or in favour of a creditor (*d*) or a purchaser for valuable consideration (*e*), the court will aid the defect, and decree the heir to surrender.

As to children, the parent is under a natural and a moral obligation to provide for them. Though the general law, or the par-

As to children.

(*a*) *Watkins*. No. lxx. to *Gilb. Ten.* 157. (*k*) p. 412.

(*b*) 2 *Ves.* 582. *Tudor v. Anson.* 1 *Ves.* 228. in *Goodwyn v. Goodwyn.* 1 *Atk.* 395. *Smith v. Baker.*

(*c*) *Tudor v. Anson*, and *Goodwyn v. Goodwyn*, and 3 *Bro. Ch. Ca.* 286. *Pike and White.*

(*d*) 1 *Ves.* 215. *Ithell v. Beane.* *Tudor v. Anson*, *ubi sup.* 1 *Bro. Ch. Ca.* 273. *Coombes v. Gibson.* 2 *Ibid.* 357. *Kentish v. Kentish.* 2 *Bro.* 325. *Birby v. Eley.*

(*e*) 2 *Chan. Rep.* 218. *Barker v. Hill.* 2 *Vern.* 165. and see 2 *Vern.* 564. *Taylor v. Wheeler*, and *Ibid.* 609. *Jennings v. Moore et al.*

[134] ticular custom, may entitle the eldest or the youngest child to enjoy the copyhold land of the parent in exclusion of the others, in cases where the requisite means have not been taken to impede the descent, upon principles of political wisdom, yet such positive law or custom cannot rescind or annul the parental obligation. Each child has equally a claim to its parent's care. Whatever may be the rules of human institution, there is a prior and transcendent law which is written with the finger of the Almighty on the heart of man. The individual, therefore, who, impelled by the powerful voice of nature, demonstrates his desire to comply with her dictates and fulfil those obligations which heaven has imposed, must peculiarly claim the aid of a court of equity, which by its benign interference may prevent such devise from being frustrated by the rigid adherence to a positive law.

Each child having a natural claim on parental care, each must be equally entitled to such equitable aid. If the estate descend to the eldest son, a surrender shall be supplied for the benefit of the other children: if the estate devolve to the youngest, the

eldest has an equal right to demand the surrender in such case as the younger had in the former (f). If the estate is to descend to all the sons, as in *gavelkind*, the surrender shall be supplied for the daughters, or in favour of one son, if such appears the intention of the parent, and the others would not be destitute (g). *copyhold estates are now devisable without a previous surrender by*
35 Geo 3 c. 122

(f) In the case of *Cooper v. Cooper*, 2 Vern. 265. the court would not supply the surrender: but that was by reason of the circumstances of the case. Had those peculiar circumstances not existed, there is no intimation that the court would have denied it, and see 1 P. Wms. 444. *Drake v. Robinson*, and 2 Vern. 165. where Lord Commissioner *Hutchins* said, that "there ought not to be one sort of equity for an eldest, and another for a younger son."

(g) 2 Vern. 163. *Bradley v. Bradley*. 6 Vin. Abr. Copyh. (W.c.) pl. 12. *Andrews v. Waller*. Remainder on an estate tail. Ca. T. Talb. 37. [Devise to a child in general terms, not mentioning copyhold estate, by will, not executed so as to pass freeholds;—surrender not supplied. 2 Ves. & Beames, 337. *Sampson v. Sampson*. And per the VICE CHANCELLOR. This is not the case of supplying a surrender for creditors; and there is no instance of doing it for a wife or child, where copyhold estate was not expressly mentioned in the will. *Byas v. Byas*,

The child entitled to the estate at law, is equally entitled to a provision in equity. But if he be provided for at the time it is enough: it matters not by whom such provision be made, so he have it. If he have it from a stranger, it is sufficient to induce and to justify the parent in precluding him from a share in his own estates. If he have an equitable provision, it matters not though he have not the patrimony of a groat. Hence then it is true, that the heir must not be *unprovided for*; but it is not accurate to say that he must not be *disinherited* (h).

2 *Ves.* 164. and many other cases shew that this was always required in that case, and that no implication from words, however large and general, would do without the term "copyhold;" though a probable intention might appear to comprehend both freehold and copyhold; where, for instance, the latter constituted the bulk of the estate, the freehold being inconsiderable. *Ibid.*]

(h) 1 *Atk.* 388. *Hawkins v. Leigh et al.* 3 *Bro. Ch. Ca.* 229. *Chapman v. Gibson.* *Ibid.* 286. *Pile v. White.* [See also 5 *Ves. Jun.* 557. *Hills v. Downton*, and 16 *Ibid.* 268. *Garn v. Garn.* And if the heir in his answer to a bill filed against him to compel a surrender, state merely that he inherits nothing

But it is not the province of the court to prescribe the quantum of such provision, either with respect to such heir or to the other children. The parent is the only judge(i). The parent indeed, must not di-

unless he is entitled to the estate in question, and does not say whether he is or is not provided for in any other manner, the court will direct an inquiry whether or not he has a provision, and as to the nature and extent of it. 17 *Ves. Jun.* 294. *Rodgers v. Marshall.*] It is my opinion, however, that what the heir has acquired or is acquiring by his own industry, cannot be considered as a provision; for if otherwise, every child may be said to be provided for who is not a cripple or insane; or the idle only would be favoured. C. W. [Whether a surrender would be supplied in favour of a younger son against a grandson, heir at law, unprovided for, has never yet been regularly determined, but in *Rodgers v. Marshall*, 17 *Ves. Jun.* 294. the Master of the Rolls declared the inclination of his opinion to be that such surrender ought not to be supplied.]

(i) 1 *Salk.* 187. *Kettle v. Townshend.* 3 *Bro. Ch. Ca.* 230, 231. *Chapman v. Gibson.* 6 *Vin. Ab. Copyh.* (W. e.) pl. 12. *Andrews v. Waller.* *Cas. T. Talb.* 36. *Cooke v. Arnham.* [See also 15 *Ves. Jun.* 394. where the distinction which, in supplying a surrender, a court of equity draws between the case of children and that of creditors, is very fully explained.]

But where a child has an equitable provision, and

[136] rect a mere illusive share; for that would, in fact, be no provision at all. But the parent is the best judge, not only of the merit, but of the wants of his children. Those will have stronger claims to his protection who are incapable of protecting themselves*.

Grandchild. Whether a surrender shall be supplied for a grandchild, does not appear to be absolutely settled†.

In the case of *Kettle v. Townsend* (k), Lord

the devise goes only to *increase* that provision, the court, it is said, will not aid: for by such provision the obligation is satisfied; and as to the overplus he must be considered as a volunteer. See 3 Bro. Cha. Ca. 188. *Lindopp v. Eborall*. Yet see *Tudor v. Anson*. 2 Ves. 582.

* [And there are cases of supplying the want of surrender upon a deed as well as a will, for a younger child; but upon the same principle as in the case of a will or the execution of a power; that is, for and against the same persons. Per the MASTER OF THE ROLLS, in *Rodgers v. Marshall*, 17 Ves. Jun. 394.]

† Difference whether the *father* be living or not. See *Elton v. Elton*, 3 Atk. 508. and 2 Fonbl. on Equity, 123. *Saund. on Uses*, 242, 3. 6 Ves. Jun. 548. (k) 1 Salk. 187.

Somers declared that such surrender *should* be supplied: but his decree was reversed in the House of Lords. Yet, in the case of *Watts v. Buller* (l), the Master of the Rolls expressed himself dissatisfied with the reversal; and said that if the case had occurred at that time (1702.) the surrender *would* have been supplied; and that he had, and would decree it so.

Lord Harcourt also, in the case of *Free-stone v. Rant* (m), thought that a surrender *should* be supplied in favour of a grandchild; as did Lord Chancellor Cowper, in that of *Fursaker v. Robinson* (n); who both disapproved of the case of *Kettle v. Townsend* as determined in the Lords (*). In *Chapman v.*

(l) 1 P. Wms. 61.

(m) 1 P. Wms. 61. note.

(n) *Ibid.* and *Preced. in Chanc.* 477.

(*) And see 5 Ves. Jun. 557. *Hills v. Downton*, also *ibid.* 565. where Lord Loughborough disapproved of the case of *Kettle & Townsend*. [In *Perry v. Whitehead*, however, (6 Ves. Jun. 544.) the court declared itself to be bound by the case of *Kettle & Townsend*, and refused to supply a surrender in favour of a grandchild. And *per* the LORD CHANCELLOR,—A rule of law laid down by the House of Lords cannot be re-

[137] *Gibson* (o) the Master of the Rolls appears to have been of the same opinion (i. e. that the surrender *ought to be* supplied;) but said that "it would be for the court to determine when the case should come before it," and, consequently, he did not consider the doctrine as settled by the case of *Kettle & Townsend*.

Lord Hardwicke, indeed, in the case of *Elton v. Elton* (p), said that the court would *not* supply such surrender: and recognized the case of *Kettle* and *Townsend* in the Lords*. And he seemingly alluded to it

versed by the chancellor; though if there is any difference from a circumstance that was not before the House of Lords, the cause may be decided upon that.—The rule of law must remain till altered by the House of Lords.]

(o) 3 Bro. Chanc. Ca. 231. See also 3 Vet. Jun. 12. where the Master said, "a grandchild is always in the same case as a child."

(p) 3 Atk. 508.

* See also 3 Atk. 189. (in *Goring and Nash*), where Lord Hardwicke said, that "the reasoning of Lord Keeper Wright, in *Watts* and *Bullas*, was too large, owing to his pursuing the maxims of law too far as to the consideration of blood to raise an use; for that

in that of *Goodwin v. Goodwin* (q); and it was before recognized in the case of *Strode v. Lord Faulkland* and others (r).

In the case of *Allen v. Poulton* (s) Sir *William Fortescue*, then Master of the Rolls, supplied such surrender against the eldest son of the testator: though perhaps that was on the principle that a person claiming under a will (which the eldest son did) must admit the whole.

Upon the whole, therefore, we have the opinions of Sir *John Trevor*, Lords *Somers*, *Harcourt*, and *Comper*, and Sir *R. P. Arden* against the determination of the Lords in the case of *Kettle* and *Townsend*, with very powerful reasons in their support:

would carry it to the remotest blood that could raise an use at law, which equity does not regard." The court, therefore, draws the line and stops at children. But why should it take the raising an use as a rule at all? Why not confine the rule to descendants, *ad infinitum*, as in the statute of distribution?

(q) 1 *Ves.* 228. and see 2 *Ves.* 582. *Tudor v. Anson*.

(r) 2 *Vern.* 625.

(s) 1 *Ves.* 121.

[138] whereas Lord *Hardwicke* seemed to have considered the doctrine as settled by that case*, and, therefore, went but little into its principle. The case of *Allen* and *Poulton* also, so far as it goes, is against it.

Natural child. In the case of *Fursaker v. Robinson* (t), the Master of the Rolls refused to supply a surrender on behalf of a natural child: and the doctrine was recognized by Lord *Hardwicke* in that of *Tudor v. Anson* (u).

Wife. A surrender shall always be supplied for a wife †, where an equal moral obligation would not be violated in giving her relief(w). A surrender, therefore, shall be decreed against a nephew or niece (x), but as a per-

* [As did Lord *Eldon* also, in the case of *Perry v. Whitehead*. See *ante*, p. 217. note (*).]

(t) *Preced. in Chanc.* 475.

(u) 2 *Ves.* 582. [As also by the Master of the Rolls in *Cricket v. Dolby*, 3 *Ves. Jun.* 10.]

† Though the devise be to her in fee. 1 *Atk.* 385. *Smith v. Baker*, and see *ante*, p. [133.]

(w) 3 *Bro. Cha. Ca.* 232.

(x) *Ibid.* 229. *Chapman v. Gibson*, and see 1 *Atk.* 385. *Taylor v. Taylor*. [Also against a sister, whether provided for or not, 16 *Ves. Jun.* 90. *Fielding v. Winwood*.]

son is under an equal moral obligation to provide for his children, they shall not be permitted to go destitute in order to support a bequest to her (*y*); but she may share the property with them (*z*).

But it is not necessary, in order to have a surrender supplied in her favour, that she be entirely unprovided for: the husband is the judge of the sufficiency of her provision (*a*).

(*y*) See *Ibid.* and 1 *Atk.* 568. in the case of *Hervey v. Hervey*.

(*z*) See 2 *Ves.* 582. *Tudor v. Anson*. [Surrender supplied in favour of a widow, against coheirs, daughters of the devisor, who were married, and infant grand daughters by deceased daughters. 5 *Ves. Jun.* 557. *Hills v. Downton*; and there lain down, that, in supplying a surrender, the court ought to look only to the object, not the circumstances of the parties; as whether the heir be provided for or not.]

(*a*) 1 *Atk.* 568. 2 *Ves.* 582. *Tudor v. Anson*. [Later decisions have determined it to be immaterial how ample or how scanty her provision may be. See 16 *Ves. Jun.* 92. If the devise to her, however, be merely in general terms, without expressly mentioning copyholds, a surrender will not be supplied, See 2 *Ves.* & *Beames*, 337. and *supr.* [135.] note (*g*).]

Brother and
sister.

[139]

But the same moral obligation not extending to collaterals, the court will not supply the surrender to effectuate a devise from a brother to a sister (*b*); *a fortiori*, if the brother and sister be of the half blood to each other (*c*).

Nephew or
cousin.

Volunteers.

So, it shall not be supplied in favour of a nephew (*d*), or cousin (*e*); and of consequence, not for a mere volunteer; as a legatee (*f*) or devisee (*g*) who is not related in blood.

Creditors.

As to creditors, we have seen that, on a general devise for payment of debts, copyholds, *if surrendered to the use of a will*, will pass though there are freeholds (*h*).

(*b*) 1 *Ves.* 228. *Goodwyn v. Goodwyn.* 2 *Atk.* 304. *Trodd v. Downs.*

(*c*) See 3 *Atk.* 189. in the case of *Goring v. Nash.*

(*d*) 2 *Vern.* 621 & 625. *Sir L. Strode v. Dow.* *Russell and Falkland.* 3 *Chan. Rep.* 169. *S. C.* 3 *Bro. Cha. Ca.* 170. *Marston v. Gowan.* [And see 15 *Ves. Jun.* 168. *Judd v. Pratt*, and 15 *ibid.* 390.]

(*e*) 2 *Ves.* 582. *Tudor v. Anson.*

(*f*) *Abr. Ca. Eq.* 122-4.

(*g*) 1 *P. Wms.* 354. *Vane v. Fletcher.*

(*h*) *Ante*, p. [132.]

But if the copyholds are *not surrendered*, the court will not supply a surrender *on a general devise for payment of debts*, if the freeholds will suffice to pay them (i).

(i) *Ca. Temp. Talb.* 78. *Malabar v. Malabar*; and 3 *Bro. Cha. Ca.* 188. *Lindopp v. Eborall*. And see 3 *Ves. Jun.* 191. *Wilson v. Mount*. See also *Supplem. to Viner*, 315. *Copyh. (M. a.) pl. 6. Hellier v. Tarrant*. [A devise by general words, viz. "Messuages, lands, tenements, and hereditaments," for payment of debts, will include copyholds, *if required*; and the want of a surrender will be supplied. 12 *Ves. Jun.* 157. *Kidney v. Coussmaker*. And the court will not only supply the want of a surrender, but direct an account of rents and profits; and laches is not to be imputed to creditors under a devise for payment of debts as to an individual devisee, to prevent or limit such account, even against an infant heir; *ibid.* 158-9. And see 15 *Ves. Jun.* 394. where the distinction which, in supplying a surrender, the court observes between the case of a child and that of creditors, is very fully explained. In the case of creditors also, the court would hold that there might be a surrender to the use of the will, though no instance could be found upon the records of the manor; or if there could be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which the court would supply. *Per the LORD CHANCELLOR*, in *Church v. Mundy*, 15 *Ves. Jun.* 396.]

But where a person, having both freehold and copyhold property, *expressly directed* that his *copyholds* should be sold for payment of debts, and then devised his freeholds to his wife and daughter, a surrender was *supplied*: but in that case the daughter was also the customary heir (*k*).

[140] So, if a copyhold be specifically devised to one person, and a freehold to another, it should seem that the freehold should be first applied (*l*). For the point here is, whether a surrender shall be supplied in favour of the *creditors*, and not whether the surrender shall be supplied in favour of the *devisee*. In this case neither the freehold nor copyhold, is specifically or even generally charged: and copyholds are not assets at law (*m*). But freeholds are not only

(*k*) 2 *Bro. Cha. Ca.* 325. *Bixby v. Eley* With regard to a charity, see *Ambl.* 571. *Attorney General v. Lady Downing et al.* But q^r. and it is there said that the surrender must be supplied *in toto* if at all. But see *post.* [140-2.] 1 *Ves.* 225. And note, the will in *Ves.* was *before the stat. of Mortmain*.

(*l*) See 1 *Bro. Ch. Ca.* *274. *Coombes v. Gibson.* and 2 *Ibid.* 325. *Bixby v. Eley.*

(*m*) 4 *Co.* 22. *a.* Nor in equity. 1 *P. Wms.* 680. Note. *Robinson v. Tonge.* A copyhold cannot be

assets in the hands of the heir, but now also, by statute, are subject to debts in those of the devisee(n). The creditors, therefore, who have specialties, may avail themselves of the freeholds; and if, from such freeholds, they are fully paid, they will cease to be creditors; and the question will be at an end. In cases, indeed, where the creditors are only by simple contract, and so cannot resort to the freeholds, either from the assets

affected, even by a judgment at law, (*Park*. 190. *Rex v. Bud.* and see 6 *Vin.* 222. *pl.* 6.) much less by a covenant that would not bind the heir at law of the copyhold. *Precedents in Chancery*, 477. *Fursaker v. Robinson*. [Copyhold estates are not liable to debts further than subjected, 8 *Ves. Jun.* 393. They are not assets for specialty debts, nor even debts to the crown, *ibid.* 394. But a lease for one year of copyhold lands, which is warranted by the common law, shall be assets in the hands of an executor. 1 *Ventr.* 163. A lease for years, however, made by a copyholder with license, it is said, shall not be accounted so, inasmuch as it is but a customary estate. *Gilb. Ten.* 295. Though the profits when received may be assets, for then they are chattels, and partake no more of the nature of customary lands; and therefore it seems reasonable that they should be assets in the hands of the executor. *Sed quære, ibid.* 296.]

(n) Stat. 3 & 4 *Will. & Ma.* c. 14.

SURRENDERS.

not being equitable assets, or from there being no personals, exhausted by the specialty creditors, to enable them to take their places, a surrender must be supplied on the principles of common justice and equity.

Surrender
supplied for a
limited interest.

[141]

If a copyhold be devised to a person for whom the testator was obligated to provide, as a wife for instance, with remainder over to a person to whom such obligation would not extend, as to a nephew or niece, the court will aid the particular devise but not the remainder over. The limited interest shall be supported ; but the residue shall result to the customary heir (o).

So, if a devise be for payment of debts*, and subject to such payment, to strangers; it seems to follow, on the same principle, that the heir shall not be compelled to surrender or make a title to more than is sufficient to satisfy the debts : for the heir has equal equity at least with the devisee; and

(o) 3 *Bro. Ch. Ca.* 170. *Marston & Gowan.*

* *Quoad Debts, vid. ante, p. [139.]*

where the equity is equal, the law must prevail (*p*).

But if the devise be to persons within such obligation, a surrender shall be supplied, though the estate for which it is supplied be in remainder. So as to remainders to sons, &c.

As if a copyholder devise to his grandson for life, with remainder to his first and other sons, remainder to his daughters in tail, with remainder to his younger son in fee, and the grandson die without issue; a surrender shall be supplied in favour of the younger son against the devisee of the grandson; though the grandson was the heir of the testator and had surrendered to will (*q*).

So, if a father, seised of copyhold lands, limit them to a first son in tail, and a second son, and a third, fourth, and fifth son; and there be no surrender; and the second son [142]

(*p*) See 2 Bro. Ch. Cas. *386. in *Compton & Collinson*.

(*q*) *Ca. Temp. Talb.* 35. *Cook v. Arnham*:

bring a bill, who is to take in possession, to have it supplied; the court will decree it for the third, fourth, and fifth sons, as well as the second; considering it as intended for a provision; and in the same order as the father had left it (r).

So, if the estate of the testator himself had been only in remainder; as if he had devised a remainder on an estate for life; the surrender would have been equally supplied (s).

Heir put to
his election.

But though a surrender of copyholds shall not be supplied against the heir in favour of volunteers, yet, as the testator has a power to devise his freeholds to whom he pleases, if he devise his freeholds to his heir and his

(r) See 3 *Atk.* 191-2. in *Goring v. Nash*.

(s) See *Ca. Temp. Talb.* 37. in *Cook v. Arnhem*. Previous limitations, then to a charity,—not supplied. But said that a surrender *might* be supplied in favour of a charity. See *Ambler* 573. *Attorney General v. Downing & al.* and *quære*, (see 1 *Ves. Jun.* 495. *Barnes v. Crowe*.) as to this case on another point.

copyholds to a stranger, the heir shall, in many cases, be put to his election.

Thus where a testator having several copyholds, part of which he had surrendered to the use of his will and part had left unsurrendered, devised to his heir and the heirs of his body; and in his will recited that as to some part of his copyholds, he was not enabled to devise them by reason of their not being surrendered, and that therefore, such part would descend to his heir, and, in consequence, directed his heir to surrender to the trusts he had created; and on his refusal so to do, ordained that the estate limited to him and the heirs of his body should cease, [143] and the remainders take effect in possession; the heir was decreed to surrender the premises (1).

So, where a testatrix, being seized of freehold estates, and some copyhold lands lying dispersedly, and having surrendered her copyhold estates to the use of her will, by her will devised all her real estates, as well free-

(1) 3 Bro. Chanc. Ca. 116. *Wardell v. Wardell*.

hold as copyhold; and gave Lady Standish, who was one of her co-heirs at law, 1000*l.* and after the making of her will, exchanged those copyhold lands for others; which were surrendered to her; but did not surrender those to the use of her will; Lady Standish was put to her election, and, on her having elected to take the 1000*l.* the court declared that she and the other co-heirs should surrender the copyholds to the uses of the will (u).

(u) 1 Bro. Ch. Ca. 588. *Frank v. Standish*, in Scacc. in Not. [See also S. C. 15 Ves. Jun. 391.] And see further as to election, 1 Ves. 234. *Cookes v. Hellier*, and *Ambler*, 430. *Unett v. Wilkes*. 1 Bro. Ch. Ca. 480. *Macnamara v. Jones*, (end of the case,) 3 Ves. Jun. 65. *Rumbold v. Rumbold*, and the cases there cited. *Ibid.* 191. *Wilson & Mount*. 7 *ibid.* 541. *Pettyward v. Prescott*. Exceptions,—see 2 Ves. 33. and 2 Ves. Jun. 371. [The point that the doctrine of election reaches the customary heir claiming a copyhold estate for want of a surrender,—admitted at the bar. 10 Ves. Jun. 589. *Blunt v. Clitherow*. and see 15 *ibid.* 393. But a devise in general terms, viz. "All the rest, residue, and remainder of my real and personal estate, of what nature," &c. soever, for the benefit of nephews and nieces, (not for creditors, wife, or children,) is not sufficient to raise a case of election, or

Again, where the testator had done all in his power to comply with the requisite forms, but was prevented by the acts or refusal of others, the court has, in many cases, decreed a surrender.

As where a person entitled to an equitable estate tail in a copyhold, endeavoured to get in the legal estate, to the intent he might have made a regular and proper surrender; but the trustees refusing to comply, he brought a bill to enforce them; and repaired to the Lord's court, and made, or tendered to make, such surrender as he could: it was held sufficient to bar the entail of the trust and that the devise was good (*w*). [144]

So, in the case of *Vane v. Fletcher* (*x*), the Lord Chancellor said that if the *heir* had done any thing himself to prevent the ac-

for supplying the want of a surrender of copyhold land, (although contiguous to, and intermixed with the freehold,) against the heir. 13 *Ibid.* 168. *Judd v. Pratt.*]

(*w*) See 2 *Vern.* 583. *Otway v. Hudson & al.*

(*x*) 1 *P. Wms.* 354-5.

ceptance of a surrender it would have been material. And we are told by the reporter, that it did not appear, after all, that the *testator had done* all in his power, for the making of the surrender; *for which reason* the title to the copyhold premises was declared by the court to be in the heir.

So, where a copyholder cannot surrender by reason of the alienation of the freehold of the premises, the court will effectuate his disposition (y).

Surrender
presumed by
reason of pos-
session.

If possession has been long peaceably held, (as for forty years, for instance,) and especially if the rolls are lost, a surrender shall be presumed. A surrender to a will being frequently made out of court, it may often be lost or forgotten by the steward, and so not inserted on the rolls, without any default of the copyholder (z).

Against
whom a sur-
render shall
be supplied.

We have already seen that a surrender

(y) 4 Co. 25. a. *Murrell and Smith.*

(z) 1 Vern. 195. *Lyford v. Coward.* 2 Cas. in Chanc. 150. S. C. 2 Freem. 106. *Knight v. Adamson.*

shall not be supplied in favour of a volunteer against a child, who would, in consequence, be left unprovided for.

But a surrender shall be supplied in favour of a wife, against a distant heir; as a nephew, &c. nephew or niece (a). [145]

So it shall be supplied against a devisee. see (b).

So, against a purchaser *with* notice (c): but not against a purchaser *without* (d); for he has an equal equity: and where the equity is equal, he who has the legal estate must prevail. Purchaser with notice.

So it shall be supplied against the assignees of a bankrupt (e). Assignees of a bankrupt.

So where a copyhold is granted for lives, Tenant for life.

(a) 3 Bro. Ch. Ca. 229. *Chapman v. Gibson*. See also 5 Ves. Jun. 557. *Hills v. Downton*. [And *supr.* p. [138.]]

(b) *Ca. Temp. Talbot*, 35. *Cook v. Arnham*.

(c) 2 Vern. 609. *Jennings v. Moore*.

(d) *Ibid*.

(e) 2 Vern. 564. *Taylor v. Wheeler*. And 2 Ves. 633. in *Hinton v. Hinton*.

and the first taker has power to dispose of it, a surrender shall be supplied against the person next in succession, equally as against the heir in the cases of inheritance (*f*).

Heir.

But as copyholds are equally liable to agreements as freeholds are, if the copyholder enter into an agreement* for a valuable† consideration, his heir shall be decreed to surrender (*g*): though he be heir in borough English (*h*), or several be heir in gavelkind (*i*).

Widow.

So against the widow claiming her free-bench (*k*).

(*f*) 1 *Chanc. Rep.* 274. *Greenwood v. Hare.*

* Though by parol, *Bunb.* 94. *Borrett v. Gome-serra*, and *Eq. Abr.* 46. *pl.* 13.

† On marriage. See 2 *P. Wms.* 624.

(*g*) 2 *Ves.* 633. *Hinton v. Hinton.* See also *Ca. T. Finch*, 272. *Pattison v. Thompson*: and *ib.* 331. *Keen v. Sparrow & al.* as to mortgages, and *post.* [213.]

(*h*) 2 *Ves.* 639.

(*i*) *Ante*, p. [134.]

(*k*) *Hinton v. Hinton.* 2 *Ves.* 631. 638. *Amb.* 277. S. C. [If a copyholder have power to bar the widow's free-bench by surrender, any act by him for valuable consideration will bar her in equity. 3 *Ves. Jun.* 256.]

But it shall not be decreed against an heir [146]
in tail, where the ancestor enters into con- Issue in tail.
tract and dies without barring the entail;
whether such entail be with, or without, a
remainder over (l).

If a person wrongfully admitted to a co- A person hav-
pyhold surrender it to the use of a purchaser, ing no inter-
and, after such surrender, become entitled est at the
to the premises by right, the court will time of
compel him to convey his interest accord- contract.
ingly, though it should seem, it will not de-
cree his heir to surrender in case he die; it
being considered as a personal equity, at-
taching on the conscience of the party, but
not descending with the land (m).

Brown v. Raindle.] So if a wife agrees with her
husband to surrender the wife's lands, she shall be
decreed to perform if the husband die. 2 *Vern.* 61.
Baker v. Child. But see *Comyn's Dig. Chanc.* (2 M. 6.)
v. 2. p. 112. [386. 8vo. ed.]

(l) 2 *Ves.* 634. Of joint-tenant, see 2 *Vern.* 63. in
Musgrave v. Dashwood.—A severance in equity, see
3 *Ves. Jun.* 257. *Brown v. Raindle.* 2 *Ves.* 634.
Per Hardwicke, in *Hinton v. Hinton.*

(m) See 1 *Anstruther*, 11. *Morse v. Faulkner & al.*

*Vol 55 Geo 3 c 192 devised of
copyhold's good without privies
surrenders.*

CHAP. IV.

OF ENTAILS.

[147] **F**EW subjects, perhaps, have been disgraced with a greater share of inconsistency and learned absurdity and confusion than that on which we are now to remark. But as error, however sanctified, must continue to be error, and as absurdity, however revered, must continue to be absurdity, it becomes us with manly dignity to oppose their influence; and instead of pusilanimously submitting to arbitrary assertion, endeavour to rescue the subject before us from the consecrated nonsense which it has been doomed to sustain.

History of
entails.

We find it repeatedly declared that estates tail were unknown till the statute *de donis*; which statute was enacted in

the thirteenth year of King *Edward* the first (n).

Before that statute, say they, all estates of inheritance were either in fee-simple absolute or conditional.

But let us not be satisfied with assertion; let us inquire into the truth or error of the doctrine before we subscribe to this [148] legal creed.

We find from historical facts, that feuds were given for life before they were given to a person and the heirs of his body; they were given to a person and the heirs of his body, before they were given to a person and his heirs, general, or indefinite. The *descendants* of the feudatory were admitted before his *collateral* relations. An estate tail, therefore, must necessarily (in reality, though not in terms) have preceded an estate in fee simple: for what was the *feudum novum* but an estate tail in effect? *Somner* says (o), that *beneficium* was feu-

Feuds granted to a person and the heirs of his body.

Feudum novum.

(n) *A. D.* 1285.

(o) *On Gavelk.* 102.

dum's elder brother; and was not the estate tail the elder brother of the *fee simple* (*p*)? -

Alienation of
an estate li-
mited to a
person and
the heirs of
his body.

[149]

When a person was permitted to alien, he was permitted only to transfer his own interest. If he had an estate to himself and the heirs of his body, it was manifestly unjust for him to alien to another and *his* heirs general. He could not say to his lord, (or to him in remainder when remainders were allowed; and they were allowed on an estate to a person and the heirs of his body at a very early time (*q*);) he could not say, "though *my* collateral relations can have no claim to the premises, yet the collateral relations of my alienee shall hold them in spite of you." Can it be supposed for a moment that, while the consent of the lord was indispensable to empower the tenant to alien, that he would have consented to such protraction of the estate? All that could be expected was to suffer the tenant to substitute the alienee for himself.

(*p*) *Watk. No. lxxix. to Gilb. Ten. 421.*

(*q*) *Bract. lib. 2. cap. 6.*

Among "the old and ancient customs of the manor of *Dymock*, in the county of *Gloucester*, used within the same manor by the customary and ancient demesne tenants of the said manor time out of mind of the remembrance of man," which were enrolled in *Chancery* in the time of Queen *Elizabeth*, and confirmed by *Cromwell*, &c. we find a custom alleged for the tenants to have their lands to them and the heirs of their bodies, with power to alien to another and the heirs of *his* body; agreeably to the observations we have made (r).

(r) "*Imprimis*, the custom of the said manor of *Dymock*, is and always hath been, from time out of mind, that the customary and ancient demesne tenants of the same manor have used freely to have and to hold their lands and tenements within the manor aforesaid to them and their heirs of their bodies lawfully begotten; the reversion or remainder thereof in fee to the lord of the manor aforesaid.

Item, That they have used always, all the time above-said, when they be disposed or will sell, give, grant, or alienate their lands or tenements to any person or persons whatsoever, to make a *state* thereof by free deeds indented, or poll deeds, to such person or persons whatsoever; to have and to hold to them and to their heirs of their bodies lawfully begotten: the re-

[150]

Progress of
alienation.

Crusades.

The policy however of free alienation for the purposes of commerce, became every day more apparent. But it was not for the purposes of commerce only that free alienation became requisite. An event of a most extraordinary nature was about to take place, which accelerated the free alienation of property. The crusades were to desolate Europe.

Conditional
fees.

Now were seigniories and tenements to be converted into specie. Now were plough-shares to be turned into swords, and pruning hooks into spears, for the holy purposes of human destruction. The baron must equip himself for his pious expedition: he required money; and he sold his lands. The contagion was extensive; and the tenant was also to fight the battles of the lord. The baron, anxious to increase his followers, willingly permitted his tenants to alien; and cared but little for the rights of reverter which were attached to seigniories

mainder thereof to the lord and his heirs for ever; with license of the lord of the manor in that behalf obtained."

Here then is an existing instance of the doctrine of conditional fees being withstood.

he was about to dispose of, or, which being [151]
temporal, he affected to despise (s).

But, even though the right of reverter was deemed of more importance by those barons who remained at home, the probability of the particular tenements actually reverting was removed to a greater distance, by the tenant's having issue born (t). This circumstance, added to the causes we have mentioned, operated to countenance the doctrine about to be established, which was to enable the tenant on such an event to alien in fee.

But when the lords returned to the baronies they had left, and were again seated in the seats of their ancestors, they thought very differently from what they did when preparing for their expeditions against those whom they denominated the enemies of the Cross of Christ. They then encouraged their tenants to alien that they might accompany them to the Holy land. They regarded but

Power of
alienation
restrained
with respect
to estates tail.

(s) *Watk. No. lxxix. to Gilb. Ten. 422.*

(t) See 2 *Bl. Comm.* 110, &c. ch. 7.

little the reversion of tenements, which, if it should actually occur, they conceived they should never enjoy. But these reasons had ceased: and they now considered that as a wrong which before they regarded as expedient.

[152]

Stat. de donis.

About the close of the thirteenth century, the Christians were expelled from Palestine. *Edward*, who was afterwards *Edward* the first of *England*, returned from thence in the year 1272. In that of 1285, the celebrated statute *de donis* was enacted: and about 1291, we find Palestine abandoned by the Christians.

The statute *de donis* considered the alienation in fee, by a person who had the estate so aliened only to himself and the heirs of his body, as manifestly tortious and unjust, even though the tenant had issue: and, therefore, it was enacted, that thenceforth the will of the donor should be observed; and the tenant should have no power to alien so as to defeat either his issue or the lord.

By this act, the tenant was restricted even

from transferring the estate limited to him and his issue, except indeed as to his own life: he could not convey it to another and the issue of that other: he could not substitute another person as to the tenancy; though the estate might possibly not be protracted.

The property was thus rendered inalienable, both with respect to the issue and the lord. Hence another great end was accomplished: that of preserving the wealth and power of the barons: and hence has this famous statute been sarcastically denominated "THE STATUTE OF GREAT MEN*."

The evil of rendering such estates unalienable, was found, however, to be intolerable among an improving and commercial people, and several means have since been prescribed for frustrating this provision of the statute *de donis*.

[153]

Right of
alienation
restored.

* *Quia emptores* is said to have been made "at the instance of the great men of the realm." See it, cap. 1.

Of copyholds
granted to a
person and
the heirs of
his body.

Having thus cursorily traced the progress of conditional fees and estates tail (u), we will proceed to inquire into the nature of that estate which may be granted by copy to a person and the heirs of his body.

*Vid Preston on
Conveyancing
Vol 1. 150*

Now it is established that, if there be a custom in a manor to grant a copyhold to a person and his heirs general, or in fee-simple, there a grant of a copyhold to a person and the heirs of his body is good; without any special custom to warrant it. As a power to limit the largest estate which the law acknowledges, necessarily includes the power of creating a less (w).

But the question here is, Whether such estate, so limited to a person and the heirs of his body, be a fee-conditional, an estate-tail, or neither one nor the other?

Now it is argued that, as all estates of in-

(u) See *Wask.* No. lxxix. to *Gilb. Ten.* 418. where the subject is more fully treated on.

(w) *Cro. Eliz.* 373. *Stanton & Barnes*, and see 3 Co. 8. a. *Heydon's case.* 4 Co. 23. a. *Bullock & Dibley.* 4 Leon. 64. *Ca.* 157.

heritance were, prior to the statute *de donis*,
 either in fee-simple absolute or conditional, [154]
 (though by the bye, this is setting out with
 a tolerable share of assumption,) the estate
 thus limited to a person and the heirs of
 his body, being an estate of inheritance and
 not in fee-simple absolute, must of necessity
 have been a conditional fee at common law;
 and also must of consequence continue to
 be so if the statute does not extend to co-
 pyhold lands. The question therefore re-
 turns, Does that statute extend to copy-
 holds or not?

It is urged on one hand, that custom,
 without the statute, cannot possibly create
 an entail: and it is urged on the other,
 that the statute, without custom, cannot
 possibly create one of copyholds: but we
 are told that, by the statute co-operating
 with the custom, an entail of copyholds
 may be created (x).

(x) See *Co. Litt.* 60. a. & b. 3 *Co.* 8. b. Custom that fe-
 offment by tenant in tail shall not be a discontinuance.
 See 1 *Roll. Abr.* 562. Customs, (T.) pl. 2. If the
 custom was from time whereof, &c. (as every custom

The question, therefore, now is, what shall be such a custom with which the statute may co-operate?

Fee conditional.

[155]

Now we find it expressly adjudged, in several cases (*y*), that the statute shall not attach upon a mere limitation to a person and the heirs of his body; but that such limitation will give a fee-conditional at common law; and that the tenant may alien in fee-simple immediately on issue had.

Reasons against applying the statute to copyholds.

Many reasons are given why the statute should not extend to copyholds. The most important are these: 1st. That it would alter the tenancy; as the donee must hold of the donor and not of the lord. 2dly. That the estate would be unalienable; as no fine or recovery could destroy the entail: 3dly. That copyholders were at the time of making the statute *de donis* only tenants at will,

must be) the entail must have been so, and consequently before the stat. which from its nature must have been within time of memory.

(*y*) *Cro. Car.* 42. *Rowden & Malster. Godb.* 367. S. C. and the cases there cited.

and their estates of too base a nature to be considered as within its provisions (z).

As to the first of these reasons we may observe, that the creation of tenure between the donee and donor is only by construction of law ; and cannot be applied to copyholds. If a person having an estate of *freehold* in fee-simple grant to another for life, or since the statute *de donis*, give to another in tail, he only grants or gives a portion of his own estate; and is answerable for the whole seisin to the lord. But, if a *copyholder* in fee surrender to the use of another for life, the tenant for life shall hold of the lord, and not of him who surrendered to his use. Now, if the surrenderee for life shall not hold of the surrenderor in this case, why should the surrenderee in tail* be considered as holding of necessity of him? That the donee must hold of the donor, and not of the lord, does not appear to be any wise *of necessity* in order to create an estate tail.

Those reasons considered.

[156]

(z) See *Rowden & Malster, ubi sup.* and 3 Co. 7. a. *Heydon's case*, &c.

* See *Cro. Car.* 44.

As to the second reason, that if entails were allowed of copyholds it would be to create a perpetuity, as there would be no mean of destroying such entail; the answer is, that this is contrary to fact: and that there are several such means; as we shall presently see.

As to the third reason, that a copyholder was only a tenant at will, we may reply that, though he be in strictness only a tenant at will, he has a fee-simple *secundum quid*.

Cases in
which the
statute is said
to apply.

However, it is laid down in other books, that if a limitation of a copyhold to one person and the heirs of his body, with remainder over to another, has been customary in a manor; or if, on a grant to one and the heirs of his body, the issue has avoided the alienation of his ancestor, or recovered in a *formedon* in descender, it will, with the co-operation of the statute, be a good entail (a).

[157] But, if a limitation to a person and the

(a) See Co. Litt. 60. b. 2 Ves. 601.

heirs of his body with remainder over to another, could have been *before* the statute, and this must necessarily be pre-supposed before we can conceive such statute to *co-operate* with custom, we may ask what was the nature of the particular estate? Was a remainder permitted on a conditional fee? If not, and such estate was, therefore, neither a fee-conditional nor an estate tail, what appellation can be assigned to it? And, consequently, as such estate was certainly an estate of inheritance, and yet, as certainly, not an estate in fee-simple absolute, if it was not a fee-conditional, how can it be true that *all* estates of inheritance were either in fee-simple absolute or conditional before the statute?

Those cases
examined.

If such limitation had been by custom, and the alienation of the ancestor *could* have been avoided by the issue, the estate seems to have been that very estate which the statute is supposed to have established; and so to be properly an estate tail (call it what you please) without its aid: since the direct end of the statute was to prevent alienation. And, consequently, such estate would have been *before* the statute.

[158] As to avoiding the alienation by a *formedon* in descender, it may suffice to remark, that the *formedon* must either have lain at the common law (*b*) or been given by the statute *de donis*; and, consequently, if such *formedon* was at the common law, it must have been *before* the statute; and if not, it was the effect of that very statute, and not of any thing with which that statute could co-operate.

Now, if a custom to grant a copyhold in fee simple will warrant a grant to a person and the heirs of his body with remainder over (*c*), such limitation would have been good in all manors where a fee simple might have been granted; as well before as since the statute. Since custom must have been immemorial; and, consequently, anteriorly to such statute. Now, if the statute will co-operate with such limitation so as to effect an estate-tail, it seems to follow that entails may be effected in all manors where a grant in fee-simple is allowed.

(*b*) See *Plowd.* 235. 2 *Inst.* 336. *Co. Litt.* 60. b.

(*c*) *Stanton v. Barnes*, *ante*, p. [47.]

It should seem, therefore, from what has been said, that the estate which we now denominate an estate tail was known before the statute *de donis*: it being apparent, from the very words of the statute, that no new estate was introduced by it (*d*). That an estate to a person and the heirs of his body, which such person had no power to alien, was not only compatible with the ancient feuds but indisputably common(*e*): That power was in after times given to the tenant to alien on issue born, for the purposes and reasons before noticed: That the statute took away such power of alienation, and restored the ancient law: That if, when copyholds became grantable to a person and the heirs of his body, the law permitted him to alien, and so brought him within the mischief of the act, there does not appear any good reason why he should not be within its remedy: That it is no answer to this to say, that, if copyholds were within this statute, they would become unalienable; for so were freeholds till fines and recoveries were per-

Estate tail known before the statute.

[159]

(*d*) And see *Wright's Ten.* 189. & 1 *Wil.* 27.

(*e*) See *ante*, p. [148.] 2 *Bl. Com.* 110. ch. 7.

mitted to be a bar: And as fines and recoveries are now bars to entails of freeholds, so recoveries and surrenders are now bars in the cases of copyholds.

Trust of a copyhold may be entailed.

[160]

Though the doctrine, therefore, when divested of all its very learned obscurity, appears thus simple and express, yet it may be conceived frequently prudent to avoid the opposition of prejudice, or of a rigid adherence to what is deemed law as consecrated by certain cases and precedents, (however numerous the cases and precedents which may be adduced to the contrary :) and, in order to effect this end, a *trust* may be created whenever the custom of the manor will warrant a grant in fee. For whenever such grants in fee are allowed, the copyholds, which may be so granted, may be entailed in effect: if not by custom at law, they may be so in equity without it. For the custom only binds the tenancy, and has nothing to do with the trust. If a surrender be made to a person and his heirs, and a trust be declared of such estate to another and the heirs of his body, a court of equity will see it observed. The trustee and his heirs are tenants to the lord; and

the lord has nothing further to do with it. The trust is between the tenant and the *cestuy que use*, and solely the subject of equity (*f*). The form of a deed, therefore, by which such a trust may be created, will be given at the end of this chapter.

Having thus considered the progress of fees conditional and estates tail, we will now inquire into the modes which have been adopted for the alienation or barring of such estates.

We have already observed that, according to the legal idea of a conditional fee, it be- Alienation of conditional fees.

(*f*) *Watk.* No. lxxix. to *Gilb. Ten.* p. 426-7. It has been suggested to me, that equity cannot call in the *legal estate*, as the *legal estate* could not be transferred to one whom the custom does not notice. But qu. whether, if the legal estate could *not* be transferred to the issue in tail, the court of equity would not in such case leave it in the trustee, and make him hold subject to the equity. If no one can take the trust who could not take the legal estate, according to the above suggestion, yet it must be proved that an estate to A. and the heirs of his body, is not included in the power to grant or limit in fee-simple.

[161] came immediately alienable in fee-simple on issue born. It was this power of alienation which was expressly restrained by the statute *de donis*. Whenever, therefore, that statute was not considered as extending to such a limitation, the power of alienation continued. When such a limitation of copyholds is only regarded as conveying a conditional fee, the person to whom it is so limited, may, on issue had, convey it to another in fee simple by a common surrender (g).

Modes of
docking
estates tail.

Whenever a limitation of copyhold property, made to a person and the heirs of his body, is regarded as creating an estate tail, such entail may be, by several means, destroyed: it having been long established, in direct defiance of the statute, that wherever an entail may be created, it may also be barred: for a perpetuity shall never in such case be allowed. And so imperious is this rule of law, that no act of the party shall be suffered to counteract it*.

(g) *Cro. Car.* 42. *Rowden & Malster.*

* See N. (1) to *Co. Litt.* 379. b.

The most general, the most solemn, and, Recovery. according to Lord *Macclesfield* (*h*), the most proper way of barring the entail, is by recovery in the Lord's Court, on a plaint, analogous to a recovery in the superior courts. And it should seem, from several authorities, that such recovery may be suffered in all manors in which an estate tail may be created, as an inseparable concomitant, and without any special custom to warrant it (*i*); [162]

(*h*) 3 *P. Wms.* 10. in *Dunn v. Green.*

(*i*) As every customary court has power *ex necessitate* to determine *adverse* suits relative to the lands held by copy of the manor, it should seem to follow as a necessary consequence, that they may also proceed to judgment on a *fictitious one*, and consequently permit recoveries to be suffered. See *post.* vol. 2. p. 34. &c. 39, 42. & 4 *Co.* 23. a. 1 *Wils.* 27. And see *Moore*, 358, *Dell v. Higden.* 1 *Roll. Abr.* 506. *Copyh.* (B) pl. 2. S. C. *Dub.* but cites *Morris's* case as so adjudged, *p. Cur.* and see *Gilb. Ten.* 176. as citing *Moore*, 753. pl. 1037. *Carter's Rep.* 9. 23. *p. Bridgman*, C. J. in *Taylor v. Shaw.* And see 2 *Ves.* 604. *Carr & Singer.*

And it should seem from *Carter*, 22, &c. (*Taylor v. Shaw*), that a custom to restrain a recovery would not be good. As a custom to bar by forfeiture *et non aliter*: the *non aliter* would be void. "If you allow a customary entail you must allow a customary recovery," said *Bridgman*, C. J.

And note, a recovery suffered in a manor court can

though other modes may be also used in the manor (*k*).

Manner of
suffering it.

The form of suffering such recovery in the manor court is this :—

[163] Let us suppose *Robert Brompton* to be tenant in tail, and desirous of barring the entail by recovery ; in which recovery *Henry Wilson* is to be tenant to the plaintiff, *Timothy Wolgrave* demandant, *Robert Brompton* to come in as vouchee, and to vouch over *Edmond Akehurst* the common vouchee of the court.

only be reversed by petition to the lord, in the nature of a writ of false judgment. 1 *Vern.* 367. *Ash. v. Rogle*, and the Dean and Chapter of *St. Paul's*, and *Shower's Ca. in Parl.* 67. See it, and 2 *J. Blackst.* 946. *Smith & Ux. v. Dean and Chapter of St. Paul's*.

If a person seized in tail of a copyhold, suffer a recovery in the Lord's Court, the fee acquired by such recovery will descend as the entail would have descended ; i. e. if the recoveror had taken the entail *ex parte materna* the fee shall descend to his maternal heirs. 5 *Durnf. & East*, 104. *Crow v. Baldwere*. One plaintiff for several tenements. See 8 *Co.* 47. b.

(*k*) 2 *Strange*, 1197. *Everall v. Smalley*.

In the first place let the copyholds be surrendered to the use of *Henry Wilson*, to make him tenant to the plaint; and let *Henry Wilson* be admitted in the usual manner.

Then let the steward say;

“ You, *Timothy Walgrave*, being now in court in your own proper person, complain against *Henry Wilson* of a plea of land (to wit) one messuage, &c. held of this manor by copy of court roll, at the will of the lord; and thereupon you pray process to be awarded against him?

“ But you *Henry Wilson* voluntarily appear to answer to the said *Timothy Walgrave*?

“ And, thereupon, you, *Timothy Walgrave*, demand against the said *Henry Wilson* the tenements aforesaid with the appurtenances, as your right and inheritance? And say that you were seized of the same in your demesne as of fee and right, according to the custom of this manor, at the will of the lord; and into which the said *Henry*

Wilson has not entry but after the disseisin of one *Hugh Hunt*, &c.?

[164] “ Whereupon you, *Henry Wilson*, come and defend your right to the tenements aforesaid with the appurtenances; and vouch over to warranty *Robert Brompton*?

“ To which you, *Robert Brompton*, appear?

“ And thereupon you, *Timothy Walgrave*, make the like demand against the said *Robert Brompton* as against the said *Henry Wilson*; and say that you were seized of the tenements aforesaid with the appurtenances in your demesne as of fee and right, according to the custom of this manor, at the will of the lord; and into which the said *Robert Brompton* has not entry but after the disseisin of the said *Hugh Hunt*, &c.?

“ Whereupon you, *Robert Brompton*, come and defend the right of the said *Henry Wilson* to the tenements aforesaid, with the appurtenances; and further call to warranty *Edmond Akehurst*?

“ To which you, *Edmond Akehurst*, appear ?

“ And thereupon you, *Timothy Walgrave*, make the like demand against the said *Edmond Akehurst* as against the said *Robert Brompton*; and say that you were seized of the tenements aforesaid, with the appurtenances in your demesne as of fee and right, according to the custom of this manor, at the will of the lord; and into which the said *Edmond Akehurst* has not entry, but after the disseisin of the said *Hugh Hunt*, &c. ? [165]

“ Whereupon you, *Edmond Akehurst*, come and defend the right of the said *Henry Wilson*; and say that the said *Hugh Hunt* did not disseise the said *Timothy Walgrave* of the tenements aforesaid, as the said *Timothy* does by his plaint above pretend and allege: and of this you put yourself upon this court, &c. ?

“ And thereupon you, *Timothy Walgrave*, crave leave of this court to imparl until four of the clock of the afternoon of this day ?

“ Therefore leave is granted to the said *Timothy*, and also unto the said *Edmond*, to the said hour.”

Here let *Timothy Walgrave* and *Edmond Akehurst* leave the court: and at four o'clock proceed: *Timothy Walgrave* being come into court, but *Edmond Akehurst* being absent,

Then let the steward say:

“ And now, after the imparlance to you by this court given, you, *Timothy Walgrave*, appear?

[166] “ Therefore let proclamation be made that the said *Edmond Akehurst* appear also.”

BEADLE, “ *Oyez, &c. Edmond Akehurst* come into court and answer to *Timothy Walgrave* of a plea of land now pending between you; or judgment shall be entered against you for the tenements which he claims.”

STEWARD, “ *Edmond Akehurst*, although solemnly called, having made de-

fault and standing in contempt of this court, let judgment be therefore entered against him that the demandant recover the tenements claimed."

Make three proclamations before judgment, thus:

BEADLE, "Oyez, &c. If any can aught say why *Timothy Walgrave* should not recover against *Henry Wilson*, *Robert Brompton*, and *Edmond Akehurst*, the tenements which he claims, let them come into court and they shall be received."

STEWARD, "But as none appears—it is considered by this court that the said *Timothy Walgrave* recover his seisin of the tenements aforesaid with the appurtenances against the said *Henry Wilson*; and that the said *Henry Wilson* have of the lands and tenements of the said *Robert Brompton* within the jurisdiction of this court (1), to the value of the tenements aforesaid.

[167]

(1) The recovery in value can be only for other copyhold lands within the same manor. See *Moore*, 358-9. *Dell & Higden*.

“ And that the said *Robert Brompton* have of the lands and tenements of the said *Edmond Akihurst*, within the jurisdiction of this court, to the value of the tenements aforesaid: and that the said *Edmond Akihurst* be in mercy.

“ And in pursuance of this judgment, you *Timothy Walgrave*, pray the precept of this court to be directed to *Ishmael Cooke*, the bailiff or headle of this manor, whereby you may be put into the peaceable possession of the tenements aforesaid with the appurtenances; according to the custom of the same manor?

“ Wherefore let such precept issue; returnable here into this court without delay.”

BEADLE afterwards appears. STEWARD; “ You, *Ishmael Cooke*, the headle of this manor or *Fairhurst*, appear, and say that you have delivered the full and peaceable possession of the tenements aforesaid to the said *Timothy Walgrave*, as by the precept of this court to you directed was commanded?”

Then admit *Timothy Walgrave*; thus, [138]

“ And in confirmation and execution of the same recovery, the lord of this manor, by me his steward, now in full and open court, grants seisin of all and singular the tenements aforesaid with the appurtenances, by this rod, according to the custom of this manor, unto you, *Timothy Walgrave*; to hold to you the said *Timothy Walgrave* and your heirs and assigns at the will of the lord according to the custom, &c. by the rents, duties, and services, &c.”

Then let *Timothy Walgrave*, *Henry Wilson*, *Robert Brompton*, and *Edmond Akehurst*, surrender the tenements to the use of *Robert Brompton*, in the usual form: and let *Robert Brompton* be admitted.

The recovery, when suffered, is thus entered on the roll:

“ AT THIS COURT came *Robert Brompton*, one of the copyhold or customary tenants of this manor, in his proper person, and surrendered into the hands of the lord of the manor aforesaid, by the rod, and ac-

Entry on the roll.

[169]

ceptance of his said steward, according to the custom of the said manor, *All* that copyhold or customary messuage, &c. *To the use* and behoof of *Henry Wilson*, of, &c. his heirs and assigns for ever: *To whom* the lord of the said manor, by his said steward, granted seisin thereof, by the rod; *To have and to hold* the said messuage, &c. unto him the said *Henry Wilson* his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor; by the rents, duties, and services therefore due and of right accustomed. *And* he was admitted tenant thereof in form aforesaid; but paid no fine to the lord, because his estate was only had for a further assurance; and his fealty was pardoned.

“ *And afterwards*, at this same court, came *Timothy Walgrave* in his proper person and complained against the said *Henry Wilson* in a plea of land, that is to say, of the said messuage, &c. and made protestation to prosecute his said plaint in this court, in the form and nature of a writ of right patent at the common law, according to the custom of the said manor; and thereupon found pledges to prosecute the same in form afore-

said; that is to say, *John Doe* and *Richard Roe*; and prayed that process might be thereupon awarded, according to the custom of the said manor, against the said *Henry*, returnable here, at this court, without delay. But the said *Henry Wilson*, being present here in court, voluntarily offered himself to answer unto the said *Timothy Walgrave*, without such process unto him directed: whereupon, the said *Timothy* demanded against the said *Henry*, the said messuage, &c. within this manor and the jurisdiction of this court, and held of this manor, by copy of court roll at the will of the lord, according to the custom of this manor, as his own right and inheritance; and whereof he was seized in his demesne as of fee and right at the will of the lord, according to the custom of the said manor, in the time of peace, in the time of our lord the king that now is, by taking the profits thereof to the value, &c. and that his right was such, he offered, &c. *And thereupon* the said *Henry* came and denied the right of the said *Timothy*, when, &c. and his seisin; of which seisin, &c. the whole, &c. and whatsoever, &c. and especially of the said messuage, &c. with the appurtenances in his demesne as of fee and right, at

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the will of the lord according to the custom of the said manor; and vouched to warrant the premises with their appurtenances, the said *Robert Brompton*; who being likewise here present in court, also appeared freely without process unto him directed; *And* the said messuage, &c. with the appurtenances, unto him did warrant. Whereupon the said *Timothy* demanded against him the said *Robert*, tenant by his warranty aforesaid, the said messuage, &c. with the appurtenances, in form aforesaid; and whereof he said he was seised in his demesne as of fee and right, at the will of the lord, according to the custom of the said manor, in time of peace, in the time of our lord the king that that now is, by taking the profits thereof to the value, &c. And that his right was such he offered, &c. *And thereupon* the said *Robert*, tenant by his warranty aforesaid, came and denied the right of the said *Timothy*, when, &c. and his seisin: of which seisin,

[171] &c. the whole, &c. and whatsoever, &c. and especially of the said messuage, &c. and premises before mentioned with the appurtenances, in his demesne as of fee and right, at the will of the lord, according to the custom of the said manor; and vouched to

warrant the premises with the appurtenances, *Edmond Akhurst*, who being likewise then present in court, also appeared freely, without process unto him directed; *And* the said messuage, &c. and premises before mentioned with the appurtenances, unto him did warrant. Whereupon the said *Timothy* demanded against him the said *Edmond*, tenant by his warranty aforesaid, the said messuage, &c. and premises before mentioned, with the appurtenances, in form aforesaid; and whereof he said he was seized in his demesne as of fee and right, at the will of the lord, according to the custom of the said manor, in time of peace, in the time of our lord the king that now is, by taking the profits thereof to the value, &c. and that his right was such he offered, &c. *And thereupon* the said *Edmond*, tenant by his warranty aforesaid, came and denied the right of the said *Timothy*, when, &c. and his seisin, &c. of which seisin, &c. the whole, &c. and whatsoever, &c. and especially of the said messuage, &c. and premises before mentioned, with the appurtenances in his demesne as of fee and right, at the will of the lord, according to the custom of the said manor; and put himself upon

See *Dyer*,
111. b. pl. 47.
Stafford's
case.

[172]

the homage of the said court in the place and stead of the great assize at the common law, and prayed a recognition thereupon to be had—Whether he had more right to have and to hold the said messuage, &c. and premises before mentioned, with the appurtenances, as tenant thereof by his warranty, so as he now holdeth the same, or the said *Timothy* to have and to hold the said messuage, &c. and premises before mentioned, with the appurtenances, so as he above hath demanded the same? *And thereupon* the said *Timothy* prayed license to imparl until four of the clock in the afternoon of the same day; and it was granted; and the same time was given to the said *Edmond*, there, &c. *And afterwards*, at the said hour of four in the afternoon of the same day, the said *Timothy* came again into court; but the said *Edmond* returned not there into court, although he was solemnly called: but departed in contempt of the court, and made default. Whereupon in full and open court public proclamation was made, that if any one laid claim to the premises before mentioned, he should come in before final judgment should be given; but none came; *therefore*, according to the custom of

the said manor, it was considered by the court that the said *Timothy* recover his seisin against the aforesaid *Henry* of the said messuage, &c. and premises before mentioned, with the appurtenances; and that the said *Henry* have of the lands and tenements of the said *Robert*, within the jurisdiction, &c. to the value, &c. And that the said *Robert* have of the lands and tenements of the said *Edmond*, within the jurisdiction, &c. to the value, &c. And that the said *Edmond* be in mercy. *And there-* [173]
upon the said *Timothy* prayed of the lord of the manor aforesaid, a precept to be directed to *Ishmael Cooke*, the bailiff or minister of the court aforesaid, to cause him, the said *Timothy*, to have full seisin of the premises with the appurtenances; returnable then at the same court without delay; and it was granted. *And afterwards*, at the same court, came the said *Ishmael*, the bailiff or minister of this court, and returned, that by virtue of the said precept to him directed, he, the same day, caused the said *Timothy* to have full seisin of the said messuage, &c. and premises before mentioned, with the appurtenances; as by the said precept to him directed was commanded. *By virtue of*

which recovery, and seisin thereupon had, as aforesaid, the said *Timothy* entered into the said messuage, &c. and premises above mentioned, with the appurtenances; and was thereof seized in his demesne as of fee and right, at the will of the lord, according to the custom of the said manor; And being so seized, by virtue of the recovery and execution had and made in form aforesaid, the lord of the said manor out of his special favour, for the better approbation, ratification, and confirmation of all and singular the premises, then in full court, by his said steward did give and deliver unto the said *Timothy* of the said premises, with the appurtenances, full seisin by the rod; *To have and to hold* the said messuage, &c. and all and singular the premises, with their appurtenances, unto him the said *Timothy*, his heirs, and assigns for ever, at the will of the lord, according to the custom of the said manor; by the rents, duties, and services therefore due and of right accustomed; but he paid no fine to the lord; because this recovery was only had for further assurance; and his fealty was pardoned. And the said *Timothy* was admitted tenant thereof in form aforesaid accordingly.

“*And afterwards*, at the same court, came the said *Timothy Walgrave*, *Henry Wilson*, *Robert Brompton*, and *Edmond Akehurst*, in their proper persons, and surrendered into the hands of the lord of the said manor by the rod, and acceptance of the said steward, according to the custom of the said manor, the said messuage, &c. and all and singular the premises above mentioned with their appurtenances, so recovered as aforesaid, *To the use and behoof* of the said *Robert Brompton* his heirs and assigns for ever: *To whom* the lord of the said manor, by his said steward, did then and there grant seisin thereof by the rod: *To have and to hold* the said messuage, &c. and premises before mentioned, with their appurtenances, unto him the said *Robert Brompton* his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor; by the rents, duties, and services thereof due and of right accustomed. *And* he was admitted tenant thereof in form aforesaid: but paid no fine to the lord; because this recovery was only had for further assurance; and he had aforetime made his fealty.”

Secondly: An entail of a copyhold may [175]

**Forfeiture
and re-grant.**

be barred by forfeiture and re-grant. But this mode of barring an entail is only adopted in compliance with the established usage of the particular manor. If such usage be not prescribed, a recovery or surrender is had recourse to for effecting a bar. But a custom to bar an entail by forfeiture and re-grant has been adjudged good.

As such forfeiture and regrant are regarded as merely the instrument or form enabling the tenant to destroy the entail, they are considered as wholly subservient to that end.

The tenant, therefore, usually makes a lease without license, and not warranted by the custom; or else surrenders to a purchaser who makes such lease; to the end that a forfeiture may be incurred, and the lands, on seizure, be regranted by the lord to the person whom the lessor shall name.

On such lease, the lord seizes the copyhold as a forfeiture; and immediately re-grants it to the person designated. For the whole procedure being a mere form for effecting a bar, the lord is only an instru-

ment, and compellable to re-grant to the person nominated, as in the case of a common surrender (*m*). The proceedings are thus entered :

“ *AND ALSO* at this court the homage [176]
aforesaid present that *A. B.*, one of the co-
pyhold or customary tenants of this manor, Entry on the
roll.
did, on or about the — day of — now
last past, being then seised of an estate tail
of and in a certain messuage, &c. situate
&c. within and held of the manor aforesaid,
at the will of the lord, according to the cus-
tom of the manor aforesaid, demise and lease
the said messuage, &c. unto *C. D.* &c. for
and during the term of seven years from
thence ensuing, without having previously
obtained the license of the lord to authorize
him so to do, and contrary to the custom of
this manor: *Whereupon* the said messuage,
&c. became forfeited to the lord. *And they
further present* that the said demise and lease,
so made as aforesaid, were made by the said
A. B. to the only end that thereby such for-

(*m*) 2 Saund. 422. *Grantham v. Copley et al.*

feiture might incur, and that the lord of this manor, on seizure for the same, might re-grant the said messuage, &c. To the use of the said *A. B.* and his heirs, (or of *C. D.*, &c.) *To the intent* that such estate tail might be utterly destroyed and docked, and the said *A. B.* and his heirs might become seised of an estate in fee simple of and in the said messuage, &c. at the will of the lord, according to the custom of the said manor ; as in such cases used and accustomed.

[177] “ *And* the said *A. B.* being present in court in his proper person, prayed the precept of this court to be directed to the bailiff of this manor, returnable without delay, commanding the said bailiff to enter into and upon the said messuage, &c. and seise the same into the hands of the lord: and the precept was granted.

“ *And afterwards*, the same court being sitting, *Ishmael Cooke*, the bailiff of the manor aforesaid, said that, by virtue of the same precept to him directed, he had entered into and upon the said messuage, &c. and seised the same into the hands of the

lord; as by the same precept he was commanded.

“ *Whereupon* the said *A. B.* further prayed, that the lord of the said manor would re-grant the said messuage, &c. to him the said *A. B.* and his heirs for ever, by copy of court roll, at the will of the lord, according to the custom of the said manor: *To which prayer* of the said *A. B.* the lord of the manor aforesaid by his said steward consented, and did, by the same steward, grant seisin thereof by the rod: *To hold* the said messuage, &c. unto him the said *A. B.* and his heirs for ever, at the will of the lord, according, &c. by the rents, customs, &c. *So that* he the said *A. B.* and his heirs might become seised of a clear estate in fee simple, at the will of the lord, &c. of and in the said messuage, &c. *And* that all estates tail before vested in the said *A. B.* might be utterly and absolutely barred and for ever extinguished; according to the usage of the said manor: *And* the said *A. B.* was admitted tenant to all and singular the said premises in form aforesaid; but he paid no fine to the lord; the same being on a com-

[178]

mon assurance: and he had aforetime made his fealty."

By surrender. A third method of barring an entail of copyholds is by surrender.

"In the case of *Everall v. Smalley* (n), it was said, by the court, that a surrender was the cheapest and the most natural way to bar an estate tail: and it was adjudged in that case that a custom to bar by surrender might be concurrent with a custom to bar by recovery *.

And if there be no custom prescribing the mode of barring such entail, it may be

(n) 2 *Strange*, 1197. 1 *Wils.* 26. S. C. 2 *Just. Blackst.* 944. *Doe d. Wightwick v. Truby & al.* and see 2 *Burr.* 969. *Martin d. Weston v. Mowlin.*

* [A single instance of a surrender in fee, by tenant in special tail, of a copyhold estate, held to be evidence of a custom within the manor to bar entails by surrender; though the surrenderor had not been dead 30 years, and though one instance was proved of a recovery suffered by a tenant in tail to bar the entail. 2 *Maule & Selwyn*, 92. *Roe d. Bennett v. Jeffery.*]

barred by surrender *, though such surrender be only to the use of a will (o).

Again, if a copyholder in tail accept a grant of the freehold of the premises held by copy, the copyhold, though entailed, will be extinguished (p). By grant of the freehold.

So if a person be a tenant in tail of a trust of copyhold, and accept a surrender of the [179]
Of the legal estate.

* In the case of *Radford v. Wilson*, 3 Atk. 815. Lord Hardwicke said, "it has never been laid down that a common recovery is necessary to bar an estate tail of copyholds."

(o) 2 Ves. 596. *Moore v Moore*. Ibid. 604. *Carr d. Dagwell v. Singer*. 2 Vern. 585. *Otway v. Hudson*. Ibid. 702. *White & al. v. Thornburgh & al.* And the remainders over will be barred. See 2 Vern. 583. *Otway v. Hudson*. So if a surrender will bar a legal it will bar an equitable entail. See 3 Atk. 815. *Radford v. Wilson*. A. tenant for life, remainder to B. in tail,—a surrender by B. in the lifetime of A.—no bar. See 1 Bro. C. C. 586. in *Highway v. Banner*. (Per Master of the Rolls.) q.

(p) 3 P. Wms. 9. *Dynn v. Green*. 1 Brown. Ch. Ca. 515. *Wynne v. Cookes*. 2 Ves. Jun. 524. *Chaloner v. Murhall*. 1 Vern. 293. 458. *Parker v. Turner*.

legal estate from the trustees, it will bar the entail and remainders over.

*Grayme &
Grayme.*

Thus, *John Grayme*, being seised of certain copyhold premises held of the manor of *Accrington* in the county of *Leicester*, surrendered them to the use of *Robert Elton* and *Jeffery Taylor* and their heirs to such uses as he should declare by will, and, on the same day, made his will and declared that the trustees should stand seised of the premises, to the use (among other uses) of *John Grayme*, son of *Oliver Grayme*, for life, with remainder to the heirs male of his body: with remainder to *Oliver Grayme*, the second son of the before named *Oliver*, for life, with remainder to the heirs male of his body, with several remainders over.

The trustees were admitted, *John Grayme*, the son of *Oliver*, became possessed as tenant in tail; and died, leaving a son *John*, who also became possessed as tenant in tail, when the trustees surrendered the premises, to the use of the said *John*, the son, in fee; who was of consequence admitted; and afterwards died without heir male, but leaving three daughters.

The plaintiff claimed as heir male of *Oliver* the second son of the first named *Oliver*, by reason of the failure of the issue male of *John*.

The defendants were the daughters of *John* the son, and claimed under the surrender made by the trustees to the use of their father in fee. [180]

And by *Lord Chancellor Apsley*,

“ The acceptance of the surrender and the admittance under it, is evidence of an intent to acquire a fee; and therefore a bar to the entail in equity.”

And the bill was dismissed, but without costs (q).

But while the equitable entail and the legal estate are in several persons, such entail must be barred by some act of the te-
Entail of a trust must be docted.

(q) *Grayme v. Grayme & Elton*, in *Canc.* Bill filed 22d June, 1763. And see also 2 *Vern.* 583. *Otway v. Hudson et al.*

nant: for though it be but an estate in equity, it will not be devisable unless the entail be barred (r).

Equitable recovery.

[181]

It was once held that a devise of such an equity in freeholds would be good without any further act to bar the entail (s): yet it has been now long determined that a recovery may be suffered of an equity; and that it is as essential to dock such equitable entail, as it would be to destroy a legal one (t). It should seem, therefore, that a recovery may be suffered, in the manor court, of an equity in copyholds, analogous to that relative to freehold property: and, indeed, that the same mode should be adopted for the barring of an equitable as it would be necessary to pursue for the purpose of destroying

(r) See 1 *Hen. Blackst.* 461. *Roe d. Eberall & al. &c. v. Lowe & al.*

(s) *Preced. in Chanc.* 228. *Woolnough v. Woolnough*. And see 5 *Ves. Jun.* 12-13. Copyholds. See 3 *Atk.* 815. *Radford v. Wilson*.

(t) 1 *Bro. Ch. Ca.* 72. *Botcler v. Allington*, and *Salvin v. Thornton*, there cited. And see 1 *P. Wms* 91. *Legate v. Sewell*, and Mr. Cox's note (2).

a legal entail: as by recovery where the special custom requires a recovery to bar a legal entail; or by a surrender, where a surrender will bar an entail of the legal estate*.

Yet a court of equity will, under certain circumstances, relieve though the entail has not been properly barred; or decree the trustees to surrender. As, where a person, being tenant in tail of the trust of a copyhold, requested the trustees to surrender to him; and on their refusal to do so, brought his bill to compel them; and pending such suit, went to the lord's court and desired to be admitted [permitted] to surrender, which was refused, because the legal estate was in the trustees; and devised his interest: it was decreed that the copyholds should pass by his will; the entail and remainders being conceived as sufficiently barred (u).

Chancery will sometimes aid in case of a trust entail.

Again, a dormant entail shall be pre- [182]

* 3 Atk. 815. *Radford v. Wilson*.

(u) See 2 Vern. 583. *Otway v. Hudson & al.*

Presumption
that an estate
tail has been
destroyed.

sumed to have been cut off, where several of the issue of the original tenant in tail have been admitted as heirs in fee-simple (w).

COVENANT to surrender COPYHOLDS, with
Declaration of Trusts, on Marriage, &c.

Recital of
marriage, &c.

THIS INDENTURE of three parts, made, &c. BETWEEN H. W. W. of &c. and M. his wife, of the first part; R. L. of, &c. (the father of the said M.) of the second part; and D. B. of, &c. and S. C. P. of, &c. of the third part. WHEREAS a marriage has been lately had and solemnized by and between the said H. W. W. and M. his now wife; and, on the treaty for such marriage, it was agreed between and by the said H. W. W., M. his said wife, and the said R. L. that the said H. W. W. should re-

(w) *Clayton's Rep.* 26. *Wadsworth's case*. And see 1 *Hen. Blackst.* 461. in *Roe v. Lowe*, where *Loughborough, C. J.* said "there was no length of possession against the entail on which to presume a surrender;" which acknowledges that a surrender *may* be presumed.

ceive with the said M. as and for her marriage portion, of the said R. L. the sum of ———, at the time and in the manner hereinafter mentioned: and in consideration thereof and of the said marriage, and in order to secure a maintenance for the said M. (in [183] case she should survive her said husband) and also a provision for the issue of such marriage (if any such might be) that he the said H. W. W. should, at his own charges, surrender, limit, and convey, *All, &c. (the Parcels premises)* situate, &c. and within, and holden of, the manor of F. by copy of court roll, of which he is now seized in fee at the will of the lord, according to the custom of the said manor, to the uses, ends, intents, and purposes hereinafter particularly expressed and declared of and concerning the same. Now THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement and in order to effectuate the same, and for and in consideration of the said sum of ——— payable as hereinafter is covenanted and expressed, and also of 10s. by each of them the said D. B. and S. C. P. &c. (the receipt of which several sums of 10s. is hereby acknowledged) and for divers other good causes and considerations him hereunto

Covenant by
the husband
to get him-
self admitted;

and, on such
admission, to
surrender the
same premi-
ses to the use
of himself for
life,

[184]

with remain-
der in fee to
trustees.

Trusts de-
clared.

moving, he the said H. W. W. for himself, his heirs, executors, and administrators, DOth covenant with the said D. B. and S. C. P. their heirs and assigns, by these presents in manner following, (that is to say,) that he the said H. W. W. shall and will at the next general customary court, or, in the mean time, at some special court to be held for the said manor of F. at his own costs and charges, cause himself to be admitted tenant to all and singular (*the premises*) according to the custom of the said manor; and, afterwards at the same court, surrender the said (*premises*) with the appurtenances, into the hands of the lord of the said manor in due form, *To the use and behoof* of him the said H. W. W. for and during the term of his natural life; and from and immediately after the determination of that estate, *To the use and behoof* of them the said D. B. and S. C. P. their heirs and assigns for ever, at the will of the lord according to the custom of the said manor. NEVERTHELESS, as to the estate and interest of them the said D. B. and S. C. P. their heirs and assigns, of and in the said premises, it is hereby declared and agreed by and between all the said parties to these

presents, and the true intent and meaning of them and of each of them is, that the same are to be so surrendered and limited to them **IN TRUST** only, and to and for the several uses, end, intents, and purposes following, (that is to say,) *In trust* that they the said D. B. and S. C. P. or the survivor of them or the heirs of such survivor, do, immediately on the determination of the estate so to be granted, surrendered, or limited to the said H. W. W. possess themselves of the said (*premises;*) and thenceforth, from time to time, receive and take the yearly and other rents, issues, and profits thereof, and pay the same over, (after discharging all taxes, &c.) (*To the widow for life, in the common form*) *And* from and immediately after the decease of the said M. the now wife of the said H. W. W. *Then upon this further trust* that the said D. B. and S. C. P. and their heirs shall stand and be seized of the said premises **IN TRUST** for the heirs of the body of the said H. W. W. (*x*) *on* the body of the said

Trustees to possess themselves of the premises on the husband's death.

And to receive and pay over the profits to widow for life.

Then in trust for the issue in tail.

[185]

(*x*) The *legal* estate is here limited to the husband for life, and the *trust* (for the statute of uses does not extend to copyholds) (*y*), is limited to the heirs of his

(*y*) 2 *Ves.* 257. *Cro. Car.* 44.

With remainder to the husband in fee.

Covenant by husband to get himself admitted after such surrender.

And to pay the fine for the whole fee. See 1 Vent. 260. 1 Mod. 121. 1 Burr. 212. &c. and post. ch. 7. Of Fines.

M. his now wife, begotten or to be begotten; And in default of such issue, IN TRUST for him the said H. W. W. his heirs and assigns for ever. And the said H. W. W. for himself, his heirs, executors, and administrators, doth hereby further covenant with the said D. B. and S. C. P. and their heirs, that he the said H. W. W. will at the said next court to be held for the said manor of F. as aforesaid, immediately after his surrendering the said (*premises*) to the uses hereinbefore expressed, cause himself, at his own proper costs and charges, to be duly admitted to the same; and, on such subsequent admission, shall and will pay such fine or fines as a person admitted tenant to all and singular the said (*pre-*

body; so that the estates cannot coalesce (z), and, consequently, the entail is not barrable by the husband; and, as to the wife, the entail is *not* to the heirs of *her* body, but to those of the husband's only; and, therefore, she has nothing to do with it. For it should be observed that the statute of *Henry 7th*, to restrain women from alienating the lands entailed *ex provisione viri*, does not affect copyhold estates (a).

(z) 1 *Fearne*, 68. &c. *Co. Litt.* 26. b. n. 3. &c. *Watk. on Desc.* 160.

(a) 2 *Ves.* 358. N. *Cruise on Recoveries*, 158.

mises) in fee simple, usually, and of right ought, and hath been accustomed to pay; [186] according to the custom and usage of the manor of F. aforesaid: So THAT the remainder in fee, of and in the said (*premises*,) and of every part thereof, may, on such his re-admission, become fixed and vested in them the said D. B. and S. C. P. and their heirs; AND so that they may be well and sufficiently seised of the (*premises*) according to the custom of the said manor, without being required, or in anywise compellable, to be themselves admitted on the determination of the estate for life of the said H. W. W. or to pay any fine or fines on their accession to the same in possession, on the determination of such estate. AND ALSO that he the said H. W. W. shall and will, at such next court, at his own costs and charges as aforesaid, cause and procure (as far as in him shall lie) the declaration of the trusts hereby created, or intended so to be, and hereinbefore particularly set forth and specified, to be duly and justly entered and inserted on the court rolls of the said manor of F. *To the end and intent* that the same trusts, and the intention of the several parties to these presents, may be the more easily

And also to have the trusts inserted in the court rolls. See 1 Just. Blackst. Rep. 167. and post. ch. 5.

Covenant
that he is
seised in fee
according to
the custom.

[187]

And has
power to set-
tle the pre-
mises.

And for fur-
ther assu-
rance.

and effectually ascertained, evidenced, and preserved. AND ALSO that he the said H. W. W. at the time of the execution of these presents, is lawfully and absolutely (b) seised of the said (*premises*) to him and his heirs in fee simple, at the will of the lord, according to the custom of the said manor of F. And that he hath full power to settle and assure the same, and every part thereof, in the manner, and to the uses, ends, intents, and purposes herein before particularly expressed, and according to the true intent and meaning of these presents. And also that he the said H. W. W. and his heirs, shall and will, at his and their own costs and charges, on the request of them the said D. B. and S. C. P. or their heirs, make, do, &c. or cause, &c. all and every such further and other acts and deeds as they the said D. B. and S. C. P. or their heirs, or their counsel learned in the law, shall reasonably advise, and require, and he, the said H. W.

(b) The word *absolute* is here used as contradistinguished from *conditional* or *defeasible*, with respect to the estate of the tenant; and not as to the nature of his estate with respect to the lord; for a copyholder has only a fee simple *secundum quid*. (See 4 Co. 22. a.)

W. or his heirs, as a copyhold tenant, or copyhold tenants, holding of the said manor of F. in fee simple at the will of the lord, may lawfully and rightfully do, &c. or cause, &c. for the further, better, and more effectually settling and assuring the said (*premises*), to the uses, ends, intents, and purposes, hereinbefore particularly specified and declared of and concerning the same, and according to the true intent and meaning of these presents and of the parties hereto.

And the said R. L. for himself, &c. (*Covenant to pay the marriage portion on a day to come.*) And the said D. B. and S. C. P. for

Covenant by the wife's father to pay the portion.

themselves severally and respectively, and for their several and respective heirs and assigns, (but not each for the other of them,) do hereby covenant with the said H. W. W. his heirs and assigns, that, on the request, (signified in writing to them respectively,) and at the costs and charges of any of the issue of the said recited marriage, who shall become intitled to an equitable estate tail, under, or by virtue of these presents, of and in the said (*premises*) (such issue being at the time of such request of the age of twenty-one years) or after the fulfilling and satisfaction of the trusts hereby created or raised,

[188]

Covenant by trustees to surrender the premises on the trust being fulfilled.

or intended so to be, then on the request (signified in writing as aforesaid) and at the costs and charges of him the said H.W.W. his heirs or assigns, surrender and yield up, according to the custom of the said manor of F. the legal estate then in them vested of and in the said (*premises*) and every part thereof, To the use and behoof of such issue, his, her, or their heirs and assigns; or To the use and behoof of him the said H.W.W. his heirs and assigns (as the case may be); or to such person or persons, and for such estate or estates, uses, ends, intents, and purposes, as such issue, or the said H.W.W. his heirs or assigns respectively, shall direct or appoint. And lastly, &c. (*here a clause enabling the trustees to retain their expenses, &c. and not to be answerable for each other.*)

Trustees to retain expenses, and not to be answerable for each other.

[189] ENTRY of the PROCEEDINGS on the ROLL.

Presentment of the death of the husband's father.

"AND ALSO at this court the said homage present, that, since the last court, G. W. of &c. died seized of *All* that messuage, &c. which he held to him and his heirs by copy of court roll, at the will of the lord, according to the custom of this

manor: *Whereupon* there happened to the lord for an heriot, one ox, being the best Heriot. beast of which the said G. W. died possessed, and which was seized by the beadle of this manor on behalf of the lord. *And* the said homage further present, that H. W. W. is the only son and customary heir of the said Heir. G. W.

WHEREUPON proclamation was duly Proclamation. made at the same court, for the said H. W. W. to come in and be admitted to the said messuage, &c. as his right and inheritance, as in such cases is used and accustomed within the manor aforesaid.

AND UPON SUCH PROCLAMATION BEING MADE, as aforesaid, came the said H. W. W. in his proper person, the same court being then sitting, and prayed to be admitted to the said messuage, &c. as his right and inheritance: *To whom* the lord of the said manor, by his said steward, granted seisin thereof by the rod: *To hold* to him the said Admission of H. W. W. as heir. H. W. W. and his heirs for ever, by copy of court roll, at the will of the lord, according to the custom of the said manor; by the rents, duties, and services, therefore due, [190]

and of right accustomed. *And* he was admitted tenant thereof in form aforesaid; gave to the lord for his fine £60, and did to the lord his fealty.

Surrender by
H. W. W.

To the use of
himself for
life,

with remain-
der to trus-
tees in fee.

Admission of
H. W. W.

AND IMMEDIATELY AFTERWARDS, the said H. W. W. surrendered into the hands of the lord of the said manor by the rod, and acceptance of the said steward, the said messuage, &c. to which he had at this court been admitted; and all his estate, right, title, and interest, of, in, and to, the same and every part thereof, *To the use and behoof* of him the said H. W. W. for and during the term of his natural life; *And* from and immediately after the determination of that estate, *To the use and behoof* of D. B. of, &c. and S. C. P. of, &c. their heirs and assigns for ever. AND THEREUPON the said H. W. W. being present in court in his own proper person, prayed to be admitted tenant to all and singular the said last mentioned premises, according to the form and effect of the said surrender: *To whom* the lord of the said manor, by his said steward, granted seisin thereof by the rod; *To hold* to him the said H. W. W. for and during the term of his natural life, with remainder

over to the said D. B. and S. C. P. their heirs and assigns, as in the said surrender is expressed, and according to the form and effect thereof, at the will of the lord, according to the custom of the said manor, by the rents, duties, and services, therefore due and of right accustomed: *And* he was admitted tenant thereof, in form aforesaid; and gave to the lord for a fine £60. (such fine being assessed for the whole fee; that is to say, as well for the remainder over as for the particular estate:) But his fealty was pardoned; he having been aforetime sworn. [191]

AND it was, previously to the said surrender, agreed and declared, by and between the said H. W. W., D. B., and S. C. P. in and by a certain deed, bearing date, &c. and made between the said H. W. W. &c. that the said D. B. and S. C. P. and their heirs, should take the estate so surrendered to them IN TRUST ONLY and for the purpose in the said deed expressed; and that the said H. W. W. should, so far as in him lay, cause such declaration of trust to be inserted upon the rolls of this manor, for the better preserving and evidencing the same: Now THEREFORE, on the prayer of the said H.

Declaration
of trust en-
rolled.

W. W. and with the consent of the said D. B. and S. C. P. the same is, by the favour of the lord, thus enrolled :

“ NEVERTHELESS, as to the estate and interest of the said D. B. and S. C. P.” &c.
(Here exemplify the declaration of trust, verbatim.)*

* [The lord admitting under a deed of settlement, has a right previously to call upon the person claiming to be admitted, to state the uses of such settlement. If the entry upon the roll be simply, “to the uses of such settlement,” it was the fault of the steward to receive it, for he had a distinct right to call for a specification of those uses. *Per* the LORD CHANCELLOR, in *Lord Kensington v. Mansell*, 13 *Ves. Jun.* 240.]

CHAP. V.

Of REMAINDERS, EXECUTORY INTERESTS, and TRUSTS.

A PERSON, seised of an estate by copy, may surrender it to the use of as many persons, successively, by way of remainder, as he pleases; so that the several portions of the estate so limited, exceed not his own interest in the premises: as, if he have an estate in fee, he may surrender to the use of A. for life, with remainder to B. and the heirs of his body, with remainder to C. in fee (c). [192]
Limitation of
remainders in
a surrender.

In speaking, therefore, of remainders of copyholds, we shall confine ourselves to

(c) *Cro. Eliz.* 373. *Stanton v. Barnes.* 4 Co. 23. a. *Bullock & Dibley, &c.* To A. for life, remainder to B. and A. die before grant (admission), grant to B. good. *Dyer*, 251. a. pl. 90.

those points in which they differ from those of freehold property.

And, *firstly*, then, as to *Contingent Remainders*.

Contingent remainders; and of the time in which they must become vested.

[193]

With respect to contingent remainders of freeholds, it is a settled rule that they must vest during the continuance of the particular estate, or *eo instanti* that it determine. And the reasons of this rule were, that there must have been a tenant in existence to perform the services of the feud, and to answer to the *præcipe* of a stranger, and also, as the remainders were only portions of the same estate, equally with the particular one, and so formed together but one and the same estate, no portion could exist when the estate of which it was a portion was utterly at an end. But these reasons, it is said, do not immediately apply to copyholds; as the freehold remains in the lord (*d*).

(*d*) See 3 *Atk.* 13. *Lovell v. Lovell.* 2 *Vern.* 243. *Mildmay v. Hungerford.* See 1 *Fearne*, 469. [*Ed. Butl.* 319.] also 4 *Durnf. & East*, 64. *Per Kenyon, C. J.* in *Doe v. Martin* [*& 10 Ves. Jun.* 282.] It is agreed, on all hands, that the admission of

Yet it should be observed, however such observation has been so frequently suffered to escape, that we have nothing to do with the *freehold* in these cases; but the subject of our inquiry is the *copyhold* interest. It matters not, therefore, in whom the freehold is: and it appears rather extraordinary that an estate of *freehold* in the lord should be supposed capable of supporting a *copyhold remainder*, since they are wholly distinct in their nature.

In the case of freeholds, there must have been a tenant of the freehold against whom a *præcipe* might have been brought: but no *præcipe* can be brought of copyhold lands as such. Claims to copyhold interests must be supported against strangers by *plaint*, [194] and against the lord by petition. With re-

the particular tenant is that of the remainder men; because the particular estate and the remainders form but *one* estate. "For the feme being admitted to the particular estate, the remainder depends thereupon and vests without other admittance; for they make but one estate." *Cro. Jac.* 31. *Auncelme v. Auncelme*. See 4 *Leon.* 9. pl. 38. & 111. pl. 226. *Cro. Eliz.* 504. *Gyppen v. Bunney*.

spect to the plaint, one would presume that the law would be analogous to that of the *præcipe*; and, consequently, that the rule *would* therefore apply: since there seems to be the same reason for an existing tenant to the latter as to the former*. Though, perhaps, the right to sue by petition, when the premises were in the hands of the lord, may be supposed to do away its necessity.

A distinction, however, has been ingeniously made with respect to the destruction of contingent remainders of copyhold in the cases of the death or forfeiture of the particular tenant. Thus, says the late *Chief Baron Gilbert* (e), if an estate be given to a

* *Bromfield & Crowder*, C. B. Trin. 45 Geo. 3. on a case from Chancery. *Mansfield*, C. J. "No sense in the thing at all; and the idea, such as it is, is a miserable one: for although in a copyhold there is no tenant to the *præcipe*, yet we know there is to the plaint." — "The reason," (of the distinction as to the act of God, and that of the party,) "is not any principle. If in one case the lord supports it, why not in all?" — "Nonsense; the lord has not the copyhold. The freehold in the lord, and the copyholder's interest, are as distinct as a legal estate and a trust."

(e) *Tenures*, 265. and see 1 *Fearne*, 471. and 2 *Va. Jun.* 209. 214. 233. *Habergham v. Vincent*.

copyholder for life, the remainder to the right heirs of I. S. if the tenant for life die, living I. S. there it seems clear that the remainder is destroyed; for it cannot take effect as by the limitation it ought. But then if tenant for life in that case had committed a forfeiture, or made a surrender, and then, living tenant for life, I. S. had died, it seems to be very clear that his right heir might take; for his estate in remainder was not to take effect after the determination of the interest of tenant for life, but after his death; and when that happened, he was able to take.

But this distinction does not seem to be [195]
anywise dependent upon the rule that a contingent remainder must vest during the continuance of the particular estate, or *eo instanti* that it determine, since, in the latter case, the estate of the heir was permitted to commence long after the particular estate was at an end. It could not, therefore, be strictly a *remainder*; for it could not be a portion of an estate which had ceased to exist. It should therefore seem that the reason of the distinction is this: as the lord accepted a surrender to the use of A. for

life, and after his life ended, to the heir of I. S. he shall be compelled to grant the estate to the heir of I. S. on the death of A. in consequence of his own act. But the estate to the heir of I. S. was not to commence till the death of A. and, therefore, if A. determine his own estate in his lifetime, the lord must enter and enjoy the lands, for this plain reason, because there is no one else to do so. A. has forfeited or abandoned his claim, and that of the heir of I. S. is not commenced. On the death of A. however, the lord must regrant to the heir of I. S. if an heir of I. S. be in existence, (*i. e.* if I. S. die before A. and leave an heir:) but if I. S. survive A. there would be no one to whom to grant: and in this respect is the ulterior estate contingent.

[196] It should seem, therefore, that as to a contingent *remainder* of copyholds, the rule must apply equally as to such remainders of freeholds: for, on the determination of the particular estate, the whole estate would be destroyed; and consequently, no *remainder* of that estate would exist. But in case the person who was not *in esse* come into existence, and be capable of taking at the

time when the estate limited to him was designated to commence, the lord shall be compellable to grant such estate to him, agreeably to his own act: not indeed as a *remainder*: for a remainder cannot exist when the estate of which it was a portion is no more; for, by all the logic in the world, if the *whole* be destroyed and gone, there can be no *part* or *portion* of it remaining.

It appears, indeed, to be acknowledged that the rule applies to copyholds equally as to freeholds, with respect to the vesting of the remainder during the existence of the particular estate, *so far as the original limitation is concerned*: for even on the assumption that the freehold in the lord *will* preserve a contingent remainder of copyholds so as to prevent its destruction by the tenant for life, yet it is confessed that it can not support it when the preceding estates are expired (*f*).

As the particular estate and remainders

(*f*) *Gillb. Ten.* 265, 303. 2 *Ves. Jun.* 214, 233. *Herbergham v. Vincent.* 1 *Fearne*, 471.

Admission of
a remainder-
man.

compose but one estate, the admission of the particular tenant is the admission of those in remainder also; and but one fine will be due (*g*).

[197]

When a remainder shall commence in possession.

If a copyhold be granted* to A. for life, with remainder over to B.; B.'s estate shall not come into possession till A.'s death, though A.'s estate be determined in his life-time. The commencement of B.'s estate in possession is expressly designated by the grant, *i. e.* on the death of A. In the interim, therefore, between the determination of A.'s estate and the death of A. the lord may enter; as no one else is entitled (*h*). It is, therefore, proper, in limit-

(*g*) See *post.* ch. 6 & 7.

* But *quære* if it be not otherwise in the case of a *surrender*. As, if a copyholder in fee surrender to the use of A. for life, and after his decease to B. For it cannot be intended, that the copyholder meant to benefit the lord. (See of *Freeholds*, 2 *Bl. Comm.* 274-5. Yet *q.* as to the analogy, as the remainderman of copyholds may enter if the particular tenant be admitted.)

(*h*) 9 Co. 107. a. *Margaret Podger's case*. 12 *Mod.* 123. *Head v. Tyler*. [And see 3 *Maucl. & Selwyn*, 68. *Doe d. Folkes & al. v. Clements*, and *infra*, p. [341].]

ing a remainder of copyholds, to limit it expressly "to the use of A. for and during the term of his *natural* life (i), and, from and immediately after the determination * of that estate, by death, forfeiture, or otherwise (k), to the use of, &c."

We come now to the inquiry whether an estate can be limited by a surrender so as to take effect only *in futuro*; and whether a fee can be limited after a fee by such a surrender of copyhold premises.

(i) See *Watk.* No. cxxiii. to *Gilb. Ten.* 454.

* It is sometimes said "after the forfeiture, *surrender*, &c. of the estate of A." But it should be remembered, that the surrender must be such a surrender as will *determine* A.'s estate, and not a surrender intended as the mean of conveyance to another person, or the estate in remainder shall not commence. If A. surrender his estate to the use of a stranger, he would surrender it with a view to its continuance, and not with an intention of destroying it. So soon as the estate of A. is *relinquished*, so soon shall the estate of B. commence; but the lord cannot abridge the estate of A., or deprive him of his right to alien. See 2 *Freem.* 118. ca. 134. 1 *Lev.* 20. *Chantrell v. Randall.*

(k) 3 *Levinz.* 94. *Strode v. Dennison.* Sir T. Jones. 189. S. C. under the name of *Bennison v. Strode.*

Of a surrender to commence *in futuro*.

[198]

That a surrender of copyholds is to be construed as a deed at common law, and not as a will, has been already noticed (l): And that an estate of freehold to commence *in futuro*, could not be created by a deed at common law, or a fee be permitted to be limited on a fee by such species of conveyance, is also sufficiently established: and it should seem therefore to follow, that a surrender cannot be made to commence, *in futuro*; and that a fee limited on a fee by such surrender would not be good.

Habendum after surrenderor's death.

It has been repeatedly adjudged, that if a copyholder in fee surrender to the use of another, *habendum* after the death of the surrenderor, it would be void (m).

(l) *Ante*, p. [99.] [108.] [110.]

(m) *Cro. Jac.* 376. *Simpson v. Southern*, and *Cro. Car.* 366. *Seagood v. Hone & Ux.* And see *Co. Copyh.* s. 35. *Tr.* p. 82. & 6 *Vin.* 216. *Copyh.* (L. e.) pl. 6. *Godb.* 265. *Ca.* 364. *Simpson's case*, & 451. *Ca.* 518. See also *Comyns's Dig.* 383. *Copyh.* (F. 6.) 4 *Leon.* 8. *Clamp v. Clamp.* and 6 *Durnf. & East*, 63. *Doe d. Ibbot v. Cowling.* But see *Clayton*, 21. *Holworth's case*, where such a surrender is said to have been held good *by the custom of the manor*, & q.

But whether a fee might be limited after Fee upon fee. a fee of copyholds, by surrender, is a point on which we find less certainty in our books.

The reasoning of the late *Chief Baron Gilbert* on this subject is ingenious and forcible; and by giving it in his own words, with the observations of Mr. *Fearne* on those of the learned baron, and by following both up with some remarks on the authorities referred to by them, will, perhaps, best enable us to develope the truth.

“ If a surrender,” says the Chief Baron, Cro. Car. 367.
 “ be to the use of I. S. *habendum* after the Cro. Eliz. 255.
 death of the surrenderor for life, this is a void surrender, being but one entire limitation; but if the surrender were to him generally, *habendum* after the death of I. R. [199]
quære if the *habendum* be void or not? But Cro. Jac. 376.
 certain it is, that if the surrender be, *habendum* after the death of the surrenderor, Cro. Eliz. 29.
ad opus & usum of his child then *in ventre sa-
 mere*, such surrender is merely void; for a 1 Saund. 151.
 copyholder cannot surrender *habendum* after 1 Roll. Rep. 135.
 his death, and so reserve to himself a March, 177.
 particular estate, no more than a freeholder

can convey so. There was a clause in a surrender: "and if it happen that the child die before his full age, or day of marriage, then I do surrender the said lands to the use of my cousin I. S. his heirs and assigns:" this surrender was held to be void as to I. S. because the contingency did not happen in the life of the surrenderor; and a man cannot surrender to take effect after his death; it was not resolved absolutely that a fee may be limited upon a fee. *Vide* the book cited in the margin, to explain these matters. This case, as reported by *Rolle* (as it is said in *Lex Cust.* 120.) is an authority that such future use is good. This is the same case as is reported by *Croke*, but directly contrary, and as it seems not grounded upon so good reason as the resolution in *Croke*; for, as before has been shewn, surrenders are not construed so favourably as wills (though *Coke* says they should be taken according to the intent of the surrenderor); neither is there the same reason; for a man may as well order a surrender in his life-time, according to the rules of law, as he may any deed to pass away a freehold estate; so that the intention of the party hath not so strong an operation in a surrender, as in a will; and,

1 *Roll. Rep.*
109. 138.
253.

Co. Cop. 97.

therefore, that reason will not support a fee upon a fee in that case, as it doth in a will, and then it is not at all like an use or trust, in which a fee may be limited upon a fee, because there the legal estate was not by any limitation extended further than one entire fee simple, which would be to extend an estate further than its original creation warranted. But an use after an use in fee, was but only to give an equitable right to somebody to have the profits, as long as the estate in fee lasted; which is highly reasonable, that a man that hath a legal estate should dispose of the profits of that estate as long as it should last; for so long had he a right to the profits himself, which right he may transfer to others, and there is no harm done to any body: but to extend the legal estate would be to keep the lord of the escheat eternally out; and it is only allowed in a will, because of the want of counsel to advise with how to do it. But an use in a surrender is not like this use; for he that hath an use by a surrender is to be admitted to the legal estate, and is not seized to an use; and, therefore, if a fee might be limited upon a fee, in such cases, the legal estate would be extended further than its original

[201] creation warranted, and a great estate be made out of a little one; so that it seems that a fee upon a fee in copyholds is not good (n).” Mr. *Fearne* says (o), “ It appears to have been a question whether limitations of this nature (shifting or secondary uses) were good in surrenders of copyhold estates. Thus, where there was a surrender, *habendum* from the death of the surrenderor, to the use of his child then in *ventre sa mere*, and his heirs and assigns for ever, and if the child die before age or marriage, then to the use of I. S. and his heirs and assigns, *Croke* says, it was resolved that the surrender to the use of I. S. was void, for that a man could not make such a conditional surrender to operate in future. On the other hand, the same case, as reported by *Rolle*, is cited in *Lex Custumaria* as an authority that such further uses are good, and that a fee may be limited on a fee upon a contingency in copyhold estates. And this the case in *Rolle’s* Abridgment seems to leave undecided. But

Symson v. Southern,
Cro. Jac.
316.

Lex Cust.
121.
1 *Roll. Rep.*
109. 138.
252. 2 *Roll.*
Abr. 791.
(P) pl. 2. (S)
pl. 8. *Gilb.*
Ten. 244.

(n) *Gilb. Ten.* 260, 263.

(o) *Conting. Rem.* 416.

in *Gilbert's Tenures* it is said, that such a resolution seems not to be grounded on so good reason, as the contrary resolution in *Croke*; for the use upon a surrender of a copyhold is not like an use or trust at common law: but he who is admitted upon a surrender, is admitted to the legal *customary* estate, and is not seised *to an use*, therefore uses upon surrenders are, in general governed entirely by the same rules as conveyances at common law, in which such limitations were not allowable; and that upon this principle it seems a fee upon a fee, in case of a surrender of copyholds, is not good, any more than in a conveyance at common law. But the above opinion of *Gilbert* is, I think, excluded by decided cases; for the validity of conditional limitations in surrenders of copyholds, appears to have been admitted in the above cited case of *Stocker v. Edwards*, or *Edwards v. Hammond*. And the decision in the case of *Sympson v. Southern*, may be referred to the point of the *habendum* after the death of the surrenderor being void; taking that as *the conditional future operation*, which was denied to the surrender. And in the case of *Paulter v. Cornhill*, *Beaumont*, Justice, conceived the li-

[202]

Vide *1 Fearn*, p. 173. and vide *Welcock v. Hammond*, cited 3 Co. Rep. 20. b. *Brian v. Caw-*
sen. 3 Leon 115.

Cro. Eliz.
361.

mitation of a fee upon a fee, as good in surrenders of copyholds as in uses of lands upon a feoffment.

Bentley v. De-lamore, 1 *Freem.* 267, 268. and vide *Calth. Reading*, 31, 32. for the same point. And vide *Taylor v. Taylor*, 1 *Atk.* 386.

“So, in the case of a surrender of copyholds, to the intent the lord should admit A. whom the surrenderor intended to marry, after marriage; until marriage, to the use of himself and his heirs, and after marriage to the use of himself and A. in tail; the whole court of C. B. held that it was good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds a surrender *in futuro* is good, for the freehold remains in the lord.”

Case of *Simpson & Southwood* examined.

But as to the case of *Simpson* and *Southwood*, or *Sympson* and *Sothorn*, it is very differently reported in the books*. As it is reported by *Rolle(p)*, judgment is said to have been given for the party who claimed the ulterior fee. But the report is very obscure, if not contradictory, in many places.

* See *March*, 177-9. *Bambridge v. Whitton & Uz.* (p) 1 *Roll. Rep.* 109. 137. 253.

The court is there said to have been of opinion with *Coke*; but *Coke's* argument, both in *Rolle* and *Bulstrode*, seems incompatible with such an opinion.

In *Croke's James* (*q*) the judgment is said to have been given for the party claiming from the heir at law; and so it is said in *Godbolt* (*r*) and *Bulstrode* (*s*).

In *Rolle's Abridgment* (*t*) it is first noticed with a "*dubitatur*;" and afterwards, when it is mentioned as adjudged, it is declared that the ulterior fee never arose, as the contingency did not happen in the life of the surrenderor (*u*).

In *Lex Custumaria* (*w*) the ulterior limitation is said to have been good; but the author rests himself on the statement in [204

(*q*) p. 376.

(*r*) p. 264. *Ca.* 364.

(*s*) 2 *Bulst.* 272.

(*t*) 2 *Roll. Abr.* 791. *Uses*, (P.) *pl.* 2.

(*u*) 2 *Roll. Abr.* 794. *pl.* 8.

(*w*) p. 121. *ch.* 15.

2 *Rolle's Abridgment*, without inserting the "*dubitatur*."

Indeed, he only translates from that of *Rolle*; and, with *Rolle*, calls the ulterior fee a *Remainder*.

As, therefore, it is only in *Rolle's Reports* that the judgment of the court is said to have been given in favour of the person claiming the ulterior fee; and as *Croke*, *Godbolt*, *Bulstrode*, and even *Rolle* himself in another work, declare that the judgment was given against him; and as the author of *Lex Custumaria* is no authority himself, but depends only upon a quotation from *Rolle*, without noticing the *dubitatur* inserted by that writer; this case of *Simpson* and *Southern*, ought not, I think, to be regarded as establishing the doctrine that a fee may be limited on a fee in a surrender of copyholds.

Stocker and Edwards.

In the case of *Stocker v. Edwards*, as reported by *Shower*(x), a conditional limitation was said to be good in a surrender.

(x) 2 *Show.* 398.

But if the case of *Stocker & Edwards* be the same with *Edwards & Hammond*, as reported in *Levinz* (y), which Mr. *Fearne* appears so to consider (z), it is indeed "somewhat differently reported" by the latter writer. [205]

In *Shower* the surrender was to the use of the surrenderor for life, and after to the use of *John* his youngest son, and the heirs of his body, if he attained to the age of eighteen years; and if he died before he attained to that age *without issue male* then to his right heirs: whereas in *Levinz*, the limitation was to the use of the surrenderor for life, and afterwards to the use of his eldest son and his heirs, if he lived to the age of twenty-one years: provided, and upon condition, that if he died before twenty-one, that then it should remain to the surrenderor and his heirs.

But what puts an end to the application

(y) 3 *Levinz*. 132.

(z) *Conting. Rem.* 372. in margin.

of the case in *Levinz*, is, that in that case the surrender was to the *use of a will*; though that important circumstance is omitted in the translation of *Levinz*: the words, in the French of *Levinz*, are, that the copyholder surrendered “*a son volunt, & devise al use luy mesme pur vie, & apres al use son eigne Fitz & ses Heyres, s’il vivra al age de 21 ans*”; provided, &c.” as above.

Welcock & Hammond, Brian & Cawson, Taylor & Taylor.

[206]

The case of *Welcock & Hammond*, cited by Lord Coke (a), was also on a surrender to will; as was the case of *Brian v. Cawson* in *Leonard* (b), and also that of *Taylor & Taylor*, in *Atkins* (c).

Paulter & Cornhill.

In the case of *Paulter v. Cornhill* (d), indeed, *Beaumont*, Justice, “conceived a fee limited upon a fee by a surrender to be good enough: for,” said he, “it shall be as an use limited upon a feoffment; and these uses shall rise out of the first surrender.”

(a) 3 Co. 20. b.

(b) 3 Leon. 115.

(c) 1 Atk. 386.

(d) Cro. Eliz. 361.

But as to the point whether a fee might be so limited on a fee, it is observable that we are informed by the reporter, that "the court spake not much thereto, but willed to have it specially found."

That of *Bently v. Delamor* in 1 *Freeman* *Bently & Delamor.* (e), indeed, so far as it goes, countenances the doctrine that a fee may be limited on a fee by surrender. But that case is very loosely given. And it is there said, that a surrender *in futuro* is good; and the mischief [here seems an omission in the report] for the freehold remains in the lord." Now the validity of a surrender to commence *in futuro* has already been remarked on.

[307]
The passage referred to in *Calthorpe* supports the position: his words are (f) these: *Calthorpe.*
"If a copyhold be surrendered to the use of I. S. and his heirs, until he shall marry A. G. and after the said marriage then to the use of them two in tail special, if after

(e) p. 267-8.

(f) p. 31-2.

they do marry, then is the surrender to them in tail, and till then to him in fee."

Upon the whole, therefore, we find that the case of *Simpson* and *Southern* militates against, rather than supports, the doctrine, that a fee may be limited on a fee of copyholds by surrender:—that the passage in *Lex Custumaria* cannot be a better authority than the book it rests upon; and, in truth, that the extract it gives is not faithfully given; it being delivered absolutely, when it was originally accompanied with a *dubitatur*:—that the case of *Stocker* and *Edwards* in *Shower* is shaken by the report of what Mr. *Fearne* himself regarded as the same case in *Levinz*; and that the case in *Levinz* was on a surrender to the use of a will:—that those of *Welcock* and *Hammond*, *Brien* and *Cawson*, and *Taylor* and *Taylor*, were on surrenders to will also:—that in the case of *Paulter* and *Cornhill*, the opinion of *Beaumont* was not acceded to by the court; but was in itself founded upon a principle, which, it is presumed, has been already disproved; namely, that the limitation should be considered as *an use* limited on a feoffment:—that the case of *Bently* and *Delamor*

is so very loosely given, and so filled with absurdity, that if it asserts that a surrender to commence *in futuro* is good, it might easily admit the other position; that if it is erroneous in one instance, it has no great claim to authority in the other:—that the doctrine, therefore, rests on the solitary passage in *Calthorpe*:—and that it is apparently inconsistent with principles which are indisputably sound: we shall not, therefore, perhaps, be justified in pronouncing, that a fee may be limited on a fee by a surrender of copyholds, even though such doctrine be advanced by Mr. *Fearne*.

That a fee cannot be limited on a fee by a common law conveyance is not necessary to be proved: it is acknowledged. And surely if a surrender of copyhold lands is to be construed as a common law conveyance, it must follow, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender: for if a fee *can* be limited on a fee by a surrender, then a surrender *cannot* be construed as a conveyance at common law.

And, on the same principle, if an estate

for life, or of inheritance, cannot be created to commence *in futuro* by a common law conveyance, and a surrender of copyholds ought to be construed as such conveyance at common law ought to be construed, then
 [209] an estate for life or of inheritance cannot be created to commence *in futuro* by a surrender of copyholds. If we acknowledge the premises we must not deny the conclusion.

The protraction of the legal fee so ingeniously and forcibly urged by Baron *Gilbert*, is a strong additional argument against the doctrine. And, although the freehold of lands held by copy remains in the lord, yet, as the copyholder is to assert his right against strangers by plaint in the nature of the several writs at common law in real actions, and as at common law with respect to freeholds, there must have been a tenant against whom the person having right might sue his *præcipe*, so there must, with respect to copyholds, be a tenant against whom to prosecute his plaint (*g*). Hence too does it seem inevitably to follow, that, by a surren-

(*g*) See *ante*, p. 193-4.

der of copyholds; an estate for life or of inheritance cannot possibly be so created to commence *in futuro*.

Add to all this that the inconvenience which may arise to individuals by a strict adherence to the rules and principles of the common law in these cases (though the adherence to general rules and principles abundantly compensates for individual inconvenience,) yet such inconvenience may be easily avoided by surrendering to the use [210] of a will in the one case, and by limiting expressly the requisite particular estate to the surrenderor in the other.

If, indeed, a surrender be made to the use of *a will*, an executory or future interest may be created in copyholds (*h*) equally as in free. The question would then be on the construction of *a will* and not on the construction of *a surrender*.

An executory interest may be created by will.

Our next inquiry is into the modes of

Of transferring or barring a contingent or executory interest.

(*h*) See the cases of *Edwards & Hammond, Welcock & Hammond, Brian & Cawsen*, and *Taylor & Taylor*, before cited, p. 204-5.

transferring or barring a remainder or executory interest in copyhold premises.

—of vested
remainders.

And as to the transfer of *vested* remainders, we have already seen that the remainder-man, being in the seisin, may surrender his remainder into the hands of the lord to the use of another, equally as if it were an estate in possession (i).

[211]
Estoppel.

But a person having only a contingent remainder or an executory interest, is not in the seisin; and, consequently, has nothing which can be the subject of a surrender. And as it seems now to be settled that a surrender cannot operate by estoppel (k), it follows that a surrender cannot, at law, be a bar to such contingent or executory interest.

But as a consequence of this very circum-

(i) *Ante*, ch. 3. Of Surrenders, p. 58.

(k) See 2 Bro. Ch., Ca. *386. *Compton & Collinson*. 1 Ves. 230. *Taylor v. Philips*. 3 Durnf. & East, 365. *Goodtitle v. Morse*. 6 Durnf. & East, 63. *Doe d. Ibbot v. Cowling*. [See also 11 East, 185. *Doe d. Blacksell et al. v. Tomkins*.]

stance (*i. e.* their not being in the seisin or tenancy,) such contingent or executory interest may, it should seem, from the very nature of the thing, be transferred or barred by other modes of conveyance, in cases where the interest would be transmissible or barrable had the estate been freehold. For the person entitled to the contingent or executory interest would not become *tenant to the lord* till it actually fell into possession. Whatever is descendible is said to be the subject of devise (*l*): now if such a contingent or executory interest in copyholds be descendible, and yet not the subject of a surrender, it surely would follow that it might be devised *without* a surrender; for otherwise a copyhold interest would be rendered inalienable in cases where a freehold interest of the same nature might be transferred; though no prejudice could accrue to others by reason of the alienation. An equity in copyholds is certainly devisable without the intervention of a surrender (*m*); [212] because the tenancy is not affected by such

(*l*) See *Dougl.* 717. and the case of *Jones et al. v. Roe, Lessee of Perry.* 3 *Durnf. & East*, 88.

(*m*) See *ante*, ch. 3. Of a Surrender, p. 60. 124.

devise: and as such equity could not be surrendered, it could not be devised at all if it could not be devised *without* a surrender. An executory interest, therefore, of copyholds; not being the subject of a surrender, may surely be devised, if such executory interest would have been devisable had it been of freehold property (n).

Release, contract, &c.

Again; it should seem that such interest may be extinguished by release; or bound in equity by a contract or agreement for a valuable consideration (o).

Of a trust of copyholds.

Copyholds are equally subject to trusts (p)

(n) See 1 *Hen. Blackst.* 341. in *Compton v. Collinson*, where it is said—"The modes of conveying freehold and copyhold estates are different, but there is surely a fair argument from analogy, that a copyhold estate transmissible under the same circumstances as a freehold, should be governed by the same rules?" And see 5 *Durnf. & East*, 111, towards the bottom of the page.

(o) See *Fearne's Executory Devises*, 58, &c. 522, &c.

(p) See *Alley's Rep.* 14. *The King v. Holland.* 2 *Ves.* 631. *Hinton v. Hinton.* 2 *Freem.* 123. *Ca.* 136.

as freeholds, but they are not within the statute of uses (q). The person having the legal estate is tenant to the lord*: the trust, therefore, may be created, modelled, transferred, or destroyed, without his concurrence†.

If a coppholder enter into an agreement [213] for sale‡ of his copyhold, he shall be considered as a trustee for the purchaser; and shall be compelled, if living, or his heir if he die, to surrender according to the contract(r).

And as the custom of the manor can attach only on the legal estate, a limitation

(q) *Cro. Car.* 44. 2 *Ves.* 257.

* [*Vid. infr.* p. [270] [293].]

† [As to the determination of a trust by the death either of the trustee or the *cestuy que trust* without heirs, *vid. infr.*, p. [216].]

‡ So if he agree to mortgage, and receives the money, he shall be a trustee for the mortgagee, 1 *Cas. in Chanc.* 170. *Martin v. Seamore*. And see *Cas. T. Finch.* 272. *Patteson v. Thompson & al.* and *ibid.* 331. *Keen v. Sparrow & al.*

(r) 2 *Ves.* 631. *Hinton v. Hinton*, *ante*, [145].

may sometimes be made of the trust, which perhaps the custom would not allow of the legal interest; thus we have seen that an estate tail may be created in equity, where it might not, perhaps, be permitted at law (*s*).

**Declaration
of trust.**

If a trust be thus expressly declared, it is prudent to have the declaration enrolled in the books of the manor, that it may be preserved; and in order to avoid fraud*. The lord too, by consenting to the trust, would be bound by it, and not be permitted to claim against such his own act (*t*). In some instances a separate deed will be necessary to declare such trusts; as in the case of a

(*s*) See *ante*, ch. 4. Of Entails, p. [159]. "The lord is not bound to admit a tenant according to the express terms of the trust, where contrary to the form of a legal conveyance." *Per* Lord Hardwicke. 3 *Atk.* 76-7. in *Car v. Ellison*.

* [For the form, &c. of such enrolment, *vid. supr.* p. [191].]

(*t*) See 1 *Just. Blackst. Rep.* 167. [Both in cases of purchase and surrender to the use of a will, the lord does, by permitting the surrender to be entered upon the rolls, partake of the trust. *Per* the LORD CHANCELLOR, in *Williams v. Lord Lonsdale*, 3 *Ves. Jun.* 752.]

charity; when the declaration should be by deed inrolled in Chancery, pursuant to the statute (u). But it is better, if circumstances will permit, to have the trusts declared in the surrender, and so entered on the court rolls *.

But a trust is frequently implied, or raised in equity, when no express declaration is made: as where a copyhold is granted to A., B., and C., and the whole† consideration money be paid by A., B. and C. shall be regarded as trustees for A. (w) though

[214]

Implication.
21 *Vin Abr.*
500. Trust,
(F.) and
Fonbl. on Eq.
vol. 2. p. 121.
ch. 5. s. 2.

(u) 9 Geo. 2. c. 36. s. 1. *Attorney General v. Lord Weymouth & al. Lincoln's-Inn Hall. Hil. 16 Geo. 2. 1743.*

* *Dowdswell v. Dowdswell. June 15. 27. Car. 2. (1 Cas. in Chanc. 261.)* The bill was to have certain surrenders made, but not ingrossed, to be made and ingrossed. The plaintiff and defendant were brothers, and in this case agreed by the Lord Keeper, that the father being lord of the manor, could not declare the trusts of copyholds granted to his sons, though he took the profits always by their consent: *eodem die* decreed between *Holford* and ———.

† See *Crop v. Norton, 2 Atk. 74.*

(w) Case of *Dyer v. Dyer, in Scacc. Nov. 1788. post. p. [216].*

the presumption of their being so, may, indeed, like all other presumptions, be rebutted, even by parol evidence (x).

But if the *cestui que vie* or persons having the legal estate be the *child** or *children*† of the person paying the consideration money, the presumption will be changed in favour of such child or children for whom the parent was morally obligated to provide, and the purchase shall be considered as an advancement or provision for them (y): but

(x) Case of *Goodright* d. *Langfield v. Hodges*, in *B. R.* on a special verdict, *post.* p. [227]. And see 1 *Atk.* 385. *Taylor v. Taylor*.

* Son. See *Cas. T. Finch* 338. *Lord Grey v. Lady Grey & al.* Son already fully advanced, considered as a stranger, as the moral obligation ceased on being satisfied or complied with. *Finch*, 341.

† Grand children, see *ante*, [136] and 2 *Fonbl. on Eq.* 122-3. and *Saund. Uses*, 242-3. *Comyns's Digest*, 24; *Chanc.* (4 *W.* 4.) 2 *Cases in Chanc.* 26. *Ebrand v. Dancer*.

(y) *Dyer v. Dyer*.—And Mr. *Fearne* was of opinion that such presumption would extend to natural children. *Posthum. Works*, 327. *Sed quare*, and *vid. ante*, p. [138]. [Under a grant by copy of court roll of a reversionary estate to A. (who had before a life

such obligation, though it shall extend to a wife *, cannot extend to a nephew or niece (z).

interest in the premises,) *habendum*.—to him for the lives of B. & C; his grandsons, and for and during the life of either of them longest living, successively, according to the custom, &c. immediately after the death, &c. or sooner determination of the estate of the said A. and reserving a heriot and 6s. rent; held that A. only took the legal estate in reversion, and not the *cestuy que vies*, there being no custom to enable them to take; although they were expressly stated in the copy to be admitted tenants in reversion. *Right d. Dean and Chapter of Wells v. Basoden.* 3 East, 260.]

* See 2 Vern. 120. *Back v. Andrews.* Prec. in Chanc. 1. S. C. and see also *Supplement to Co. Copyh.* s. 10. Tr. 175. To wife and a stranger successively.—Advancement for wife, but the stranger shall be only a trustee. *Back and Andrews*, and *Kingdom v. Bridges.* 2 Vern. 67. *Benger v. Drew.* 1 P. Wms. 780. And see 2 Freem. 33.

(z) *Goodright d. Langfield v. Hodges*, post. p. [227]. Advancement good against creditors. *Kingdom v. Bridges*, and post. [224]. and *Back v. Andrews.* An advancement, if intended at the time, and no alteration can be made afterwards. 2 Freem. 33-4. *Woodman v. Morrell.* And see 2 Atk. 74. *Crop v. Norton.* Father sold—yet an advancement. That it was not an advancement must be proved by the other side. 2 Freem. 252. *Shales v. Shales.*

Comyns's
Dig. 247.
Chancery,
(4 W. 4.)
2 Cus. in
Chanc. 26.
Ebrand v.
Dancer.

And as the doctrine relative to trusts of this kind, appears settled on very rational grounds, by the cases of *Dyer & Dyer*, and *Goodright d. Langfield v. Hodges*, (in which the former cases were fully considered,) and [215] as they are not yet extant in print, they will be given at large at the end of this chapter.

Equity of redemption.
See vol. 2. p. [62.]

If a copyhold be surrendered on condition, by way of mortgage, and the condition be broken, yet the equity of redemption shall follow the descent of the legal estate: thus if the copyhold were in borough English, the equity would go to the youngest son: or if it were in gavelkind, to all the sons equally (*a*).

Resulting trust.

And it is the same as to resulting trusts: as in the case of an undisposed residue; the portion undisposed of shall result as in freeholds (*b*).

Estate *pour autre vie*.

So the trust of an estate *pour autre vie* of

(*a*) 2 *Ves.* 304. *Fawcett v. Lowther*, and *ante*, p. [120].

(*b*) See *ante*, p. [95]. Of Surrenders, and see *Goodright d. Langfield v. Hodges*, *post.* p. [227].

copyholds, shall go to the executors or administrators, as if it had been of the freehold estate (*c*).

But a distinction has been made with respect to trusts executed and executory; for in the execution of the latter, the court will be guided by the rules of the common law: as in the case of an executory trust for the heirs of the body of a person in gavelkind lands, the court will decree an estate to the eldest son and the heirs of his body, with remainder to the second son and the heirs of his body, &c. and not according to the custom of gavelkind (*d*). And so also in the case of borough English lands; the heir at common law shall take the benefit of the executory trust (*e*). [216]

(*c*) 2 *Vern.* 264. *Rundle v. Rundle*, and the case of *Goodright d. Langfield v. Hodges, post.* And shall pass as *personal* estate by a will, and not under the word "copyholds," (6 *Ves. Jun.* 633. *Watkins v. Lea.*) for the testator has only the equity.

(*d*) See 1 *Atk.* 607. *Roberts v. Dixwell.*

(*e*) *Starkey v. Starkey*, in *Scacc.* cited 7 *Bac. Ab.*, Uses and Trusts, (H) p. 179-80. *Gwillim's* ed. But note, in the cases of *Roberts v. Dixwell*, and *Starkey*

If a trust be created of a copyhold, and the trustee die without heir, so that the lands escheat, the lord shall not be subject to the trust, but shall have the lands discharged of it (*f*).

Case of DYER *v.* DYER, *in Scacc.*

See 1 P.
Wms. 5th ed.
p. 113. *in*
Not. Before
Lord Chief
Baron Eyre,
Baron Ho-
tham, and
Baron
Thompson,
Nov. 20, 21,
and 27, 1788.

IN 1737, certain copyhold premises, ohlden of the manor of Heytesbury, in the county of Wilts, were granted by the lord according to the custom of that manor, to *Symon Dyer*, (the plaintiff's father,) and *Mary* his wife, and the defendant *William* (his other son), to take in succession for

v. Starkey, the heirs took *by purchase*: the parent did not take at all in the latter, and in the former only an *equitable estate*. See my *Descents*, 223. N.

(*f*) See 1 *Str.* 454. 1 *Just. Blackst. Rep.* 166-7. *Burgess v. Wheate*, and 3 *Atk.* 77. [And under a devise of a copyhold to A. and his heirs, in trust for B. and his heirs; upon the death of B. without heirs, it has been held, that the heir of the trustee has no equity to compel the lord to admit him. 3 *Ves. Jun.* 752. *Williams v. Ld. Lonsdale.*]

their lives, and to the longest liver of them. The purchase money was paid by *Symon Dyer* the father; he survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in the copyhold premises (among others) to the plaintiff, his youngest son. [217]

The present bill stated these circumstances, and insisted that the whole purchase money being paid by the father, although by the form of the grant the wife and the defendant had the legal interest in the premises for their lives, in succession, yet in a court of equity, these were but trustees for the father: and the bill, therefore, prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant operated as an advancement to him from his father, to the extent of the legal interest thereby given him. And this was the whole question in the case.

The *Lord Chief Baron*, after directing the

cause to stand over for a few days, delivered the judgment of the court as follows.

[218] “ The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question? And whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause; and I then, indeed, entertained very little doubt upon the rule of a court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them in order that the ground of our decision may be put in as clear a light as possible; especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case in addition to those cited, which is that of *Rumbold v. Rumbold*, on 20th April, 1761. The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copy-

Rumbold v. Rumbold.

hold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase money. This is a general position supported by all the cases; and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made, without a consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being a *child* or *children* of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases, that the nominee, being a child, it shall have such operation *as a circumstance of evidence*, that we should be disturbing land marks if we suffered either of those propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a *circumstance of evidence*. I think it would have been a

[219]

more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised an use at common law: surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent: which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said, that this shews that the father *intended* an *advancement*, and *therefore* the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? *Lord Nottingham** could not

* See *Cas. T. Finch*, 338. (341.) *Lord Grey v. Lady Grey*.

get over this; and he ruled, that in such a case the resulting trust was not rebutted: And in *Pole v. Pole*, in *Vesey*, Lord Hardwicke thought so too. [220] As yet the rule in a court of equity, as recognised in other cases, is, that the father is the only judge, as to the quantum of a son's provision: and this distinction, therefore, of a son's being provided for or not, is not very solidly taken or uniformly adhered to. It is then said, that a purchase in the name of a son, is a *primá facie* advancement (and indeed it was difficult to put it in any other way). In some of the cases, some circumstances have appeared which go pretty much against that presumption; as where the father has entered and kept possession, and taken the rents; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father. The answer given is, that the father took the rents as guardian of his son: now would the court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered, that these are subsequent acts; whereas the intention of the father in taking

the purchase in the son's name must be proved by the concomitant acts: yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son, being under age, could not give receipts in any other manner. But, I own, this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be, that the first taker might surrender the whole lease, that shall make the other lessees trustees for him: but this custom operates on the legal estate, and not on the equitable interest; and, therefore, this is not a very solid argument. When the lessees are to take *successive*, it is said, that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and to be sure, as the circumstance of a child being the nominee is not *decisive* the other way, there is a great deal of weight in this observation. There may be very many prudential reasons for putting in the life of a child

in preference to that of any other person; and if, in that case, it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to lives in succession the inference is very different. These are the difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now if it were once laid down, that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

“ It must be admitted that the case of [222] *Dickinson v. Shaw* is a case very strong to support the present plaintiff's claim. That came on in Chancery on 22d May, 1770. A copyhold was granted to three lives, to take in succession; the father, son, and daughter. The father paid the fine; there was no custom stated. The question was, whether the daughter and her husband were trustees during the life of the son, who sur- *Dickinson v. Shaw.*

vived the father? At the time of the purchase the son was nine, the daughter seven years old. It appeared that the father had leased the premises from three years to three years, to the extent of nine years. On this case, Lords Commissioners *Smythe* and *Aston* were of opinion, that, as the father had paid the purchase money, the children were trustees for him. To the note I have of this case it is added, that this determination was contrary to the general opinion of the bar; and also to a case of *Taylor v. Aston*, in this court. In *Dickinson v. Shaw* there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father. If that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the court was, that the burthen of proof lay on the child; and that the cases which went the other way, were only those in which the estate was entirely purchased in the name of the children. If so, they certainly were not quite correct in that idea; for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of *Rum-*

[223]

Rumbold v.
Rumbold.

bold v. Rumbold, before Lord Keeper *Henley*, on 20th April, 1761, where a copyhold was taken for three lives in succession, the father and two sons; the father paid the fine; and the custom was, that the first taker might dispose of the whole estate: (and his lordship then stated the case fully.) Now this case does not amount to more than an opinion of Lord Keeper *Henley*; but he agreed with me in considering a child as a purchaser for good consideration of an estate bought by the father in his name; though a trust would result as against a stranger. It has been supposed, that the case of *Taylor v. Alston* in this court, denied the authority of *Dickinson v. Shaw*. That case was held before Lord Chief Baron *Smythe*, myself, and Mr. Baron *Burland*, and was the case of an uncle purchasing in the names of himself and a nephew and niece.—It was decided in favour of the nephew and niece; not under any general idea of their taking as relations, but on the result of much parol evidence which was admitted on both sides; and the equity on the side of the nominees was thought to predominate. Lord *Kenny* was in that cause; and his argument went solely on the weight of the parol evidence.

Indeed, as far as the circumstance of the first taker's right to surrender, it was a strong case in favour of a trust. However, we determined the other on the parol evidence. That case therefore is not material.

*Bedwell v.
Froome.*

“ Another case has been mentioned which is not in print, and which was thought to be materially applicable to this: that of *Bedwell v. Froome*, before Sir *Thomas Sewell*: but that was materially distinguishable from the present. As far as the general doctrine went, it went against the opinion of the Lords Commissioners. His honor there held, that the copyholds were part of the testator's personal estate; for that it was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself. There could be no question; and her being a trustee, it was a freehold in him for his daughter's life; but in the cases on the argument his honor stated the common principles as applied to the present case; and, indeed, by saying that, as between father and child, the natural *presumption* was, that a provision was meant. The anonymous

case in 2 *Freeman*, corresponds very much with the doctrine laid down by Sir *Thomas Sewell*; and it observes that an advancement to a child is considered as done for a valuable consideration, not only against the father but against creditors. *Kingdome v. Bridges* 2 *Vern.* 67. is a strong case to this point, that is, the valuable nature of the consideration arising as a provision made for a wife or for a child: for there the question was against creditors.

“ I do not find that there are in point [225] more than three cases which respect copyholds, where the grant is to take *successivè*: *Rundle v. Rundle*, 2 *Vern.* 264. which was a case perfectly clear. *Benger v. Drew*, 1 *P. Wms.* 781. where the purchase was partly with the wife’s money: and *Smith v. Baker*, 1 *Atk.* 385. where the general doctrine as applied to strangers was recognised; but the case turned on a question, whether the interest was well devised. Therefore, as far as respects the particular case, *Dickinson v. Shaw* is the only case quite in point: and there the question is, whether that case is to be abided by? With great reverence to the memory of those two judges who decided it, we think that case cannot be fol-

Kingdome v. Bridges.
2 *Vern.* 67.

Rundle v. Rundle.
Benger v. Drew.

Smith v. Baker.

Dickinson v. Shaw.

lowed; that it has not stood the test of time or the opinion of learned men: and Lord *Kenyon* has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation; namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser: this we think is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must shew that intention by a declaration of trust: and we do not think it right to doubt, whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, various reasons might perhaps occur in every case, upon which it might be argued that an advancement was not intended. And how it is not a very prudent conduct of a man just married, to tie up his property for one child, and preclude himself from providing for the rest of his family: but this applies equally in case of a purchase in the name of a child only: yet that case is admitted to be

an advancement; indeed, if any thing, the latter case is rather the strongest; for there it must be confined to *one* child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout.

“ This bill must, therefore, be dismissed; but after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it *without costs**. *Vid. Meale v. Franklin*
Lawton 13.

* [In *Doe d. Burrough & Us. v. Reade*, 8 East, 363. note (a). the authority of this case is said to have been recognised by Lord Kenyon, in *Swift d. Farr v. Davis*, B. R. Hil. 39 Geo. 3. where it was held, that where three lives in a copy are to take *successive*, and a father, who is the sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as in that case, by taking at the same court a license from the lord to himself and his mother, (who had her widowhood right in the copyhold,) to lease for 70 years: in which case, if the father afterwards grant a lease by way of mort-

[227]

In the King's
Bench on a
special ver-
dict. See
Left's Rep.
230.

**GOODRIGHT on the Demise of LANG-
FIELD v. HODGES.**

THE lord of the manor of *Sutton* in *Somersetshire*, by his steward, granted the reversion of an estate, held by copy of the said manor, and then in the possession of *Elizabeth Baynton*, widow, to her son *William Baynton*, and *Silvester Langfield*; *To have and to hold* the same to them for their lives and the life of the longer liver of them, in succession, immediately after the death of *Elizabeth Baynton*.—*William Baynton* paid

gage, pursuant to such license to lease, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee. Or if there were any doubt of that, or if the license of the lord might be construed to extend only to the first taker of the new copy jointly with his mother, and the first taker alone executed such license after her death, yet a court of equity (even if the surviving life (the son) were to succeed at law on his strict legal title,) would make the son, the surviving life, convey to his father's lessee, and pay all the costs at law and in equity.]

the fine, and held during his life. Upon his death, *Hodges*, his next of kin and administrator, entered; upon whom the lessor of the plaintiff entered.

This cause was argued at the county assizes before Mr. Justice *Ashhurst*. On the part of the plaintiff *parol* evidence was offered, to prove that it was the lessee *William Baynton's* intent, at the time of taking the lease, that after his decease the estate should go to *Langfield*. But Mr. Justice *Ashhurst* objected to the competency of the evidence; and thereupon the jury found their verdict, subject to the opinion of the Court of King's Bench.

Lord Mansfield delivered the opinion of the court:

“ The question is, whether it should be [228] deemed a resulting trust for *Silvester Langfield*. This may be divided into two points: Whether the evidence ought to be received; and whether, if received, it is sufficient to rebut the resulting trust.

“ As to the first; it is always presumed

by the court, that whoever pays the fine takes for his own use and benefit, and does not mean to serve the others, who are mere nominees, to give him as large an estate as by the rules of the manor he can have; and as his personal estate is diminished by the payment of the fine-money, his personal representative (c) is entitled to the advantage resulting from thence. The cases are contradictory; perhaps inaccurately reported. But I can remember, that in *November, 1752*, *A.* having renewed, by adding two new lives who were directed to take in succession, they claimed; but the court decreed it to be a resulting trust for his personal representative. Otherwise in the case of a son, where the father's renewal is supposed to be for his advancement (d). This distinction is not within the statute of frauds, because it arises by implication of law. Yet, though it arises by implication of law, it may be rebutted; and it is certain that parol evidence may always rebut an equitable presumption. See 1 *Vern.* 366. *A.* pur-

[320]

(c) *Rundle v. Rundle*, ante, p. [215].

(d) *Dyer v. Dyer*, ante, p. [215].

chased in *B.*'s name, and it was admitted by the Master of the Rolls, that he might be permitted to prove that he purchased for his own use and benefit, and so raise a resulting trust for himself, but that the proofs must be strong; which not being the case, *A.* was nonsuited. *Secondly*, here they are as strong as possible. It must first be remarked, that *Baynton* had himself permitted the legal estate to be in his nephew after his death; the parol evidence makes it most clear that he did so intentionally. The first witness deposed, that *Baynton* always said that he intended it for *Langfield* after his death, as soon as it came to hand; that he would give it to *Langfield*; and that he had purchased it for *Langfield*. The second witness deposed, that he said, he intended it for *Langfield*; that after Mrs. *Baynton*'s death it was to be *Langfield*'s; that such was his constant discourse from the time of his purchase to the time of his death. The evidence, therefore, is full for the plaintiff, and is admissible evidence.

“Therefore let the *postea* be delivered to the plaintiff.”

By *Mansfield, Aston, and Willes.*

CHAP. VI.

OF ADMISSION*.

[230]

Introduction.

No one could be placed in the tenancy without the consent of the lord.

The lord took possession when the tenancy was vacant.

WE have already seen that as the kingdom was divided into manors, so each manor was subdivided into inferior tenancies. Each tenement was holden of the immediate lord and regarded as his gift. Hence no person could be placed in his tenancy without his consent.

As the several tenements were granted in consideration of certain returns and services, the lord resumed the possession whenever there ceased to be a tenant to perform them. On the death of a tenant, therefore, the lands returned to the lord, and became the subject of a new grant.

* Admission necessary as to customary freeholds. See 5 Burr. 2766, &c. and 2785. *Vaughan d. Atkins v. Atkins.*

In after times, when the grant was extended to the heirs of the tenant, the renewal became a matter of right. But still, on the death of the ancestor, the lord was entitled to enter and resume the possession. The heir might be at a distance, or unable to assert his claim. Besides, it would frequently happen, that the succession was the object of dispute. In each case the lord was entitled to the possession of the lands. If a claimant appeared, the lord had a right to be satisfied that his title was legitimate; and that there was an actual tenant to perform the services and to render the returns. If none appeared, none had a right but himself; and as the consideration of his gift had failed, he was justified in resuming the lands.

Proclamation
for the claim-
ant to be ad-
mitted.

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When a tenant therefore died, proclamation was made in the court of the manor for the heir to make his claim. If he did not appear at the third proclamation (which, according to the feudal law, was to be made within a certain number of days (*h*),) the

(*h*) See *Wright's Ten.* 197. N. (*k*). *Watk. N. c. to Gilb. Ten.* 442.

lord took the possession. If the heir afterwards appeared within the year,* the possession was restored to him; if he did not, he lost his feud.

Entry without proclamation.

Relief.

By the laws of *England*, however, the heir of a freeholder was enabled, from very ancient days (i), to enter on the lands without this formal process; and only payed his relief to the lord. Which relief, as to the tenant in socage, was, by a law of *William the Conqueror*(k), fixed at a year's rent, and, in fact, seems to have been no more than accounting to the lord for the profits

* See *Plowd.* 372. 1 *Show.* 86.

(i) *Ll. Hen.* 2. cap. 70. See *Seld. Jan. Angl.* b. 2. c. 17.

(k) *Ll. Gul. cap.* 40. *Seld. Eadm. Spicil. & Kell. Norm. Dict.* *Dicitur autem rationabile relevium - - - de socagio - - - quantum valet census illius socagii per unum annum. Glanv. lib.* 9. cap. 4. f. 144. See also *Glanv. lib.* 7. cap. 9. and *stat. Marl.* 52 *Hen.* 3. cap. 16. In some manors the relief is only half a year's rent; as (with respect to gavelkind freeholds) in several *dens* within the manor of *Glassenbury*, in *Kent*. (From original minutes of the rolls. C. W.)

of that year, for which he might, under certain [232] circumstances, have retained the lands (*l*).

With respect, however, to lands held immediately of the king, the ancient rules were rigorously preserved. The heir could not enter without suing his livery. And though such livery was sued out immediately, yet the king was entitled to the year's profits (*m*). *Primer seisin*

In *Scotland*, to this day, the heir has the seisin given him of whomever he holds (*n*).

And, with respect to copyholds, the ceremonies of the feudal times must yet be observed. As the copyholder held only at will, the tenancy must necessarily have ceased on his death: however, if the copyholder has an estate to himself and his heirs, the lord cannot defeat the claim. *Admission of the heir of a copyholder.*

When a copyholder, therefore, dies, his *Presentment of the ancestor's death.*

(*l*) See *Watk. N. i. to Gilb. Ten.*

(*m*) See 2 *Bl. Com.* 66. ch. 5.

(*n*) See *Delrymp. F. P. c. 6. s. 3. p. 245, &c.*

death is presented by the homage at the next court; and proclamation is made for the heir to claim. Which presentment and proclamation are thus recorded: . . .

Entry of presentment.

[233]

“ ALSO AT THIS COURT the said homage presented, that, since the last court, *A. B.* of &c. died seized of all that messuage, &c. which he held to him and his heirs, by copy of court roll, at the will of the lord, according to the custom of this manor: *Whereupon* there happened to the lord for an heriot, &c. *And the said homage further presented, That B. B.* was the only son and customary heir of the said *A. B.*

—of proclamation where the heir is known.

“ WHEREUPON proclamation was duly made at the same court, for the said *B. B.* to come in and be admitted to the said messuage, &c. as his right and inheritance; as in such cases is used and accustomed within the manor aforesaid.”

If the heir be not known, it must be so presented; thus,

Presentment.

“ But who is the next heir to the pre-

ADMISSION.

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misses aforesaid, is to the said homage not known."

And the proclamation will then run:

"For any person or persons having right and proclama-
to the said premises, to claim the same, and tion where
be admitted thereto." the heir is not
known.

If the heir does not appear on proclama-
tion, his default is recorded:

"WHEREUPON the first proclamation was Default of
duly made at the same court for the said appearance
B. B. to come in and be admitted, &c. But recorded.
he came not: wherefore his default was re- [234]
corded; and the second proclamation will be
made at the next court."

At the next court make further proclama-
tion; and enter it,

"Also at this court the *second* proclama- Further pro-
tion was made, &c." clamations.

If no one comes on the *third* proclamation, Seizure.

Quousque.

See 8 Co.
100. b.

the lord may seize*. But, unless there be a special custom, he can only seize *quousque* (o); or till the claim be made. And even if there be a custom, infants, persons *non compos* or beyond the seas, would not be bound (p).

Provision by
statute in
case of in-
fants and
femes covert.

But, with respect to infants and *femes covert* entitled by descent or by surrender to

* If tenant for life will not come in, it will be no forfeiture of the estate in remainder. See *Baspool v. Long*. 1 Roll. Abr. 568. *Customs*, (G) pl. 5. and *Cro. Eliz.* 879. S. C. and *post.* [336].

(o) See 1 Lev. 63. *Earl of Salisbury's case*. 3 Durnf. & East, 164. *Doe d. Tarrant & al. v. Hellier & al.*

(p) *Gillb. Ten.* 230-1. i. e. they would not be precluded from claiming the premises when the disability should be removed: but the lord may seize *quousque*, and retain the profits till they be actually admitted. See *Sir Rich. Letchford's case*, as cited by *Treby*, attorney-general, in *Carth.* 42-3. and *Cro. Jac.* 101. *Whitton v. Williams*. *Ibid.* 226. *Underhill v. Kelsey*, *Godb.* 268. *Ca.* 371. 1 *Show.* 88. If the lord seize on the heir not coming in, it seems clear that the heir cannot, after such seizure, enter till he appear and make his claim in court. For the seizure would be useless, could the heir enter without satisfying the lord that he had right.

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the use of a will, it is provided by the statute 9 Geo. c. 29. that no forfeiture shall be incurred by reason of their not coming in to be admitted on such proclamations. But that if such femes covert or infants do not come in to be admitted in person, or the former by their attornies (which they are thereby empowered to make,) or the latter by their guardians, or, having no guardians, by their attornies (which they may appoint [235] by virtue of that act), at one of the three then next courts, the lord or steward, on due proclamations, &c. may appoint such guardians or attornies for the purpose of admission (g).

And, therefore, if one of several co-heirs of a copyholder be a feme covert at the time of the ancestor's death, and the lord seize the whole estate (in default of the heirs not coming in to be admitted, after three procla-

(g) And see *post*, p. [320]. Note, the stat. is not noticed, except by counsel, in *North v. Earl of Strafford*; 8 P. Wms. 148. though that case was determined in 1732. and there said that an action would lie for the fine.

mations,) without first appointing an attorney for the feme covert, according to the requisites of the statute, 9 *Geo. c. 29.* a seizure of the whole estate is irregular; though it be not known to the lord that one of the heirs is a feme covert (r).

Heir within
the realm at
the time of
proclamation;

If the heir, who is not otherwise privileged, be within the realm at the time of the first proclamation made, and then go beyond the seas, he shall be bound: and, on the other proclamations being duly made, the lord may seize (s).

at the time
of the descent.

[236]

And it should seem, that such heir shall be bound, on presentment and proclamations made, if he leave the kingdom after the descent and before the first proclamation; for the point on which these cases turn is, whether, by intendment of law, the heir could have had notice of the descent, and his obligation to be admitted, or not? And it seems that the law will intend, that

(r) 3 *Durnf. & East*, 162. *Dec d. Tarrant v. Bellier.*

(s) 8 *Co.* 100. b.

he had knowledge, if he be within the realm at the time of his ancestor's decease: but if it should be apparent that the heir could not have been informed of such event before his departure, the court would relieve; as in such case the presumption or intendment of law would be rebutted. And it should seem that the court would be satisfied, even with slight grounds, in order to rebut such presumption; as forfeitures are not to be favoured, and the inclination would be rather for the benefit of the heir at law (t).

Yet, on proclamation being made for the heir to come in, it is not necessary to specify the *particular estates* of which the former tenant died seised, nor, in order to seise, to prove the proclamations *viva voce* (u).

Proclamation, how to be made.

(t) *Watk. N. ci. to Gilb. Ten.* 442. [A person claiming to be admitted as heir to a copyhold, need not tender himself to be admitted at the lord's court, if the steward upon application to him out of court has refused to admit him. 2 *Mauls & Selwyn*, 87. *Doe d. Burrell v. Bellamy & al.*]

(u) See 1 *Keb.* 287. *Lord Salisbury's case.* And 3 *Durnf. & East*, 164. N. (a).

Necessary be-
fore seisure.

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But it is absolutely necessary, in order to warrant the lord in seising, that proclamation *be* made, on the regular presentment: for till presentment and proclamation be actually made, the heir is not obliged to claim (*w*).

Proclamation
for surren-
deree to be
admitted.

By special custom proclamation may be made for the surrenderee to come in and be admitted; (though, generally speaking, the surrenderor continuing tenant till the actual admittance of the *cestui que use*, the lord, having his tenant, has nothing to do with the surrenderee;) and, if he come not in after three proclamations, the lord may seise*. Yet if a copyhold be surrendered to a person for life, with remainders over; and the

(*w*) 1 *Leon.* 100. *Rumney & Eve.* 3 *Ibid.* 221. *Anderson & Hayward.* 4 *Ibid.* 30. S. C.

* See 1 *Show.* 31. & 83. *King v. Dilliston.* *Salk.* 386. *Carth.* 41. *Cro. Eliz.* 879. *Baspool v. Long.* See also *Preced. in Chan.* 573. where it is said, that the lord has no means to compel the surrenderee to come in to be admitted. But where he can by custom compel the admittance of a surrenderee, a court of equity will not relieve in the case of a surrender by way of mortgage. 2 *Vern.* 367. *Tredway v. Fotherley.*

particular tenant will not come in, his default shall not prejudice the remaindermen (x).

If, on the third proclamation, no one appears to claim the premises and demand admission, the lord is justified in seising them, at least *quousque*: and then a warrant is issued to the bailiff of the manor, commanding him to enter on behalf of the lord. The entry of the proceedings is thus made on the roll:

Warrant to seise.

“ ALSO AT THIS COURT the third proclamation was made, &c. but no one came: THEREFORE a precept was issued, directed to the said beadle, commanding him to enter upon the said premises, and seise the same into the hands of the lord, until such claim shall be made and sustained;” or “ into the hands of the lord,” generally; as the case may be.

Entry on the roll.

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(x) See 1 Roll. Abr. 568. Custom, (G) pl. 5. *Baspool v. Long*.

Form of the
warrant.

The warrant or precept may be thus (y):

Manor of } " You are hereby commanded
Fairhurst. } to enter upon all, &c. of which
A. B. lately died seised, and, although due
proclamations have been made, are yet un-
claimed, and to seise the same into the
hands of the lord; and to make your return
to this precept without delay."

" Given under my hand; &c.

" C. D.

" Steward, &c.

" To I. C. beadle or
bailiff of the manor of
Fairhurst aforesaid *."

Return.

The bailiff should then endorse the pre-
cept thus;

" By virtue of the within written precept
to me directed, I have entered upon the

(y) But it should seem from the case of *Trotter v. Blake*, (2 *Mod.* 229.) that a written precept is not of necessity.

* Bailiff cannot use force in seizing. See 3 *Lev.* 39. *Ca.* 142.

premises within mentioned and seised the same into the hands of the lord, as by the said precept I was commanded. [239]

"I. C.

"Bailiff, &c."

Then enter the return on the rolls, thus :

"AND now at this court the said beadle (or bailiff) returned, [or, "came in his proper person, and said"] that, by virtue of the precept to him directed, he entered into all, &c. and seised the same into the hands of the lord, as by the same precept he was commanded."

In the cases, however, of grants and surrenders, the person about to be admitted is generally in court, either personally or by attorney ; and, therefore, the formalities of proclamation are avoided, as they are rendered unessential. And the entry of admission on a surrender is thus :

Proclamation not made when the person to be admitted is in court.

"AND the said C. D. being present in court in his own proper person, prayed to be admitted tenant to all and singular the

Entry of the admission.

[240]

said last mentioned premises, according to the form and effect of the said surrender: *To whom* the lord of the said manor, by his said steward, granted seisin thereof by the rod: *To hold* to him the said C. D. and his heirs for ever, by copy of court roll, at the will of the lord, according to the custom of the said manor, by the rents, duties, and services, therefore due and of right accustomed. *And he was admitted tenant thereof in form aforesaid; gave to the lord for a fine ——; and made his fealty*.*”

Lord compellable to admit.

But, before we consider the several essentials or formalities of an admission, we must remark that, as the lord may compel the heir, and in some cases the surrenderee, to be formally admitted; so the lord also is, in his turn, now compellable to grant admission according to the designation of the surrenderor.

By bill in equity.

When the lord accepted a surrender under confidence to re-grant the copyhold so sur-

* [As to entry on the rolls of the admission of trustees under a deed of settlement, *vid. supra.* p. [191].]

rendered to another person, either expressly named at the time or to be afterwards named in the tenant's will, the Chancery enforced the trust as a matter of conscience, and compelled the lord to admit the surrenderee (z).

But a more summary and expeditious mode of compulsion is by a *mandamus* at law; which will now lie to compel the admission of the person named (a).

By *mandamus*.

(z) See *Bro. Ten. p. Copie. pl. 10.* 4 Co. 24. a. *Cro. Jac.* 368. *Ford & Hoskins.* 4 Burr. 1961. 2 Bl. Com. 366. ch. 92. [See also 3 *Ves. Jun.* 752. *Williams v. Ld. Lonsdale.*]

(a) 9 *Durnf. & East*, 197. *the King v. Rennett.* And *ibid.* 494. *The King v. the Lord of the manor of Hendon, &c.* 4 Burr. 1961. And see 5 Burr. 2787. Lord compellable by *mandamus* or decree, to admit. *Per* Lord Mansfield. See also 2 *Ves.* 396. *Lord Montague v. Dudman*; where the chancellor said, that the court had no power to grant an injunction to stay proceedings on a *mandamus*. The cases of the *King v. Rennett*, and the *King v. the Lord of the Manor of Hendon*, have indeed been controverted. 3 *Ves. Jun.* 752. But see 5 *East*, 58. *Roe d. Conolly v. Vernon & al.* and 7 *ibid.* 521. *The King v. Marq. of Stafford & al.* [See

[241] It is said also, in some books, that, if a
 Action. surrender be made, and the lord refuse to
 admit the surrenderee, the surrenderor may
 maintain an action against the lord in con-
 sequence of such refusal (b): though it has
 often been adjudged that such an action
 could not have been supported by the sur-
 renderee (c).

In what cases
 the lord is
 compellable. But when we assert that the lord is com-
 pellable to admit the surrenderee, it must
 be understood with many qualifications.
 Though the lord shall not be permitted to

also 6 East, 431. *The King v. Coggan & al.* where a
mandamus was directed to the lord and steward of a
 manor to admit one to a copyhold tenement who had a
prima facie legal title, in order to enable him to try his
 right, though equity had before refused to compel the
 lord to admit him for want of his shewing an equitable
 right to the property. If, however, there be a claim of
 a previous fine due to the lord, in respect of the ances-
 tor from whom the party claims, the rule will be granted
 only on payment of such fine or fines as shall be due.
Ibid.]

(b) *Lex. Custum.* 162. ch. 17. cites *Galloway's case*,
 as so adjudged: and 3 *Bulst.* 217. cites S. C.

(c) *Galloway's case*, *ubi sup.* *Cro. Jac.* 368. *Ford*
v. Hoskins. *Moore*, 842, S. C.

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defeat the right of the surrenderor, with respect to the nomination of his successor in the tenancy, yet, on the other hand, the tenant must not be permitted to prejudice the rights of his lord. Before the tenant can compel an admission, the person appointed, and the estate he is to take, must be such as the surrenderor would be warranted in appointing.

If a copyholder for life, therefore, surrender to the use of another, for the life of that other, the lord may refuse to receive such surrender: or, as the use of the surrender is, generally, not declared till the surrender is made, he may refuse to admit the surrenderee. The old tenant had an estate for *his own* life, and not for the life of another: he [242] could have transferred *that* interest, but he could not have obliged the lord to grant an interest which might have been of longer continuance; even though a custom were alleged to support it (*d*).

Tenant for life.

So, if a copyholder in fee surrender to the Corporation, &c.

(*d*) *Watk. No. cxix. to Gilb. Ten. 451.*

use of a corporation, either aggregate or sole, which is enabled by statute or licence to hold lands, it might well be questioned whether an admission could be compelled. For, in the first place, it does not indeed appear how a corporation of either kind can be a copyhold or customary tenant, or discharge the services, as suit of court, &c. (e). And in the next place, as a corporation is immortal, the fines, in consequence of death, would be lost. The lord would surely, therefore, be justified in refusing an admittance so apparently to his prejudice. In cases, therefore, in which the persons intended to be benefited are corporate, the premises should be surrendered to the use of a person who is not under such incapacity and his heirs in trust, for such corporate person (f). But as a trust is within the mortmain acts, *the licence of the king* should be obtained.

Tennor.

In the case of the Earl of *Bath* against

(e) See *Bro. Fealty*, pl. 15. *Co. Litt.* 66. b. 2 *Lord Raym.* 864. in *Tonkin v. Croker*.

(f) See *ante*, ch. 5. p. 213.

Abney, it was said, by the counsel for the plaintiff, according to the report of that case in *Burrow* (f), that, "though a lord may grant a copyhold for a term of years, yet the lord is not obliged to *admit* for a term of years." [243]

But, though this is merely the assertion of the counsel at the bar in argument, without being urged on any apparent principle of law or reason, and, consequently, entitled to little credit, yet, as it might possibly mislead, it may be necessary to remark that such assertion is absolutely contradictory not only to indisputable authority but to constant usage (g). If a surrender be made to the use of a person for years, or, which is the same thing in effect, if a surrender be made to the use of a will, and the testator devise to a person for years, the lord would most certainly be compellable to admit him, equally as if he had taken for life. The no-

(f) p. 217.

(g) See 4 Co. 23. a. Co. Copyh. s. 47. Tr. p. 110. And see the Earl of Bath & Abney: *Hauchett's* case in *Dyer*, 261. a. &c. &c. *Batmore & Graves*, 1 Vent. 260, &c.

minee or devisee for years, would indisputably become tenant to the lord, as to the portion of copyhold interest appointed him*. The lord, therefore, might insist upon his coming in to be admitted. And by consequence, the surrenderee for years may insist, in his turn, on an admittance, if refused. A termor for years *by licence* could need no admittance, as he would not become tenant to the lord.

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Heir at law.

As the admission of an *heir at law* is only for the benefit of the lord, the court will not grant a *mandamus* to compel such admission, by reason of its inutility: as the heir has as good a title without admittance as with it, against all the world but the lord (h). "It is a matter only between the lord and tenant:" (i) and if the lord refuse admission, he is tenant as to others without it; and the lord shall not be suffered to take any advantage of his own neglect.

* See Hob. 177. *Swinnerton v. Miller*. Bull. N. P. 107.

(h) 2 Durnf. & East, 197. *The King v. Rennett*.

(i) Cowp. 741. *Knight v. Bate*.

On the death of his ancestor, the heir may enter and take the profits (*k*), and maintain an action for any trespass done to his possession (*l*). He may also make a lease of the copyhold as warranted by custom; and on such lease an ejectment may be brought (*m*).

What the heir may do before admission.

If he die after entry and before admittance, there shall be a *possessio fratris* (*n*): and his heir may enter also, as he himself could have done (*o*). His widow shall be

(*k*) 4 Co. 22 b. *Brown's case*. *Ibid.* 23. b. *Clarke & Pennyfather*. A. supposing himself entitled, was admitted, and then surrendered. Afterwards the lands descended on him. His previous surrender no estoppel, 1 Anstr. 11. *Morse v. Faulkener & al.* and 3 Durnf. & East, 365. S. C.

(*l*) 4 Co. 23. b.

(*m*) 1 Leon. 100. *Rumney & Eves*. Moore, 596. *Bullock & Dibley*. Cro. Jac. 403. *Fronwell & Welch*. 3 Durnf. & East. 169. and see 1 Roll. Abr. 502. Copyh. (M.) pl. 1.

(*n*) *Dyer*, 291. pl. 69.; for it is the entry, and not the admittance, which makes the *possessio fratris* of copyholds. See 1 *Freem.* 45. *Foxe v. Smith*, and *Watk. on Desc.* 51-2. 63. n.

(*o*) 4 Co. 23. b. *Clarke & Pennfather*.

- [245] endowed (*p*); and the husband of an heiress shall have his curtesy (*q*).

The heir may even surrender to the use of another, on satisfying the lord for his fine (*s*); whether the inheritance be in possession or only in remainder or reversion (*t*); and if he would devise his interest he must surrender to the use of his will (*u*).

vid 56 Geo 3
c 192

(*p*) See *Gilb. Ten.* 287-8. and *Watk. on Descents*, [1st edit.] 53-4. in *Not.* and the books there cited: [viz. *Moore*, 272. *pl.* 425. & 597. *pl.* 813. *Lex Custum.* ch. 6. p. 54. ch. 9. p. 67. ch. 17. p. 157. 6 *Fin. Copyh.* (H. e.) 209. and see *Dyer*, 291-2. *pl.* 69. & *Calth.* 60. also *Hob.* 181. 1 *Bac. Abr. Copyh.* (E) & (G). 1 *Espin. N. P.* 146. cites *Hutt.* 18.]

(*q*) See *Gilb. & Watk. on Desc. ubi. sup.* and the books there cited. [See also 10 *East*, 583. *Doe d. Milner v. Brightwen.*]

(*s*) 4 *Co.* 22. b. *Brown's case*, and *ante*, p. [59]. [102]. and see *Dalrymple, F. P.* ch. 6. s. 3. p. 252-3. 1 *Anstruther*, 13. *Morse v. Faulkener & al.*

(*t*) *Cro. Jac.* 31. *Auncelme v. Auncelme. Cro. Eliz.* 662. *Colchin v. Colchin.* 1. *Roll. Abr. Copyh.* 499. (E) *pl.* 1. S. C. But note,—*Auncelme & Auncelme*, only goes to the surrenderee in remainder, and not to his heir.

(*u*) *Strange*, 487. *Smith & Triggs*, and *ante*, p. [102].

If there be a custom to surrender into the hands of a tenant, a surrender into the hands of the heir before admittance would be good (*w*).

But, though the heir before admittance may maintain an action in the common law courts, as an action of trespass or ejectment, yet he cannot sue in the court of the manor: and therefore, he shall not have a plaint in the nature of an assize (*x*). So he cannot sit on the homage (*y*): though it is said, that the lord may avow upon him before he be admitted (*z*). But it should seem, that this can only be where the delay of ad-

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(*w*) See 1 *Keb.* 25. *Muniface* and *Baker*, and *ante*, p. [78].

(*x*) *Co. Copyh.* s. 41. *Tr.* 94. *Gilb. Ten.* 287. *Kitch.* 60. *a.* and *b.*

(*y*) *Kitch.* 87. *b.* *Co. Copyh.* s. 41. *Tr.* 94. But it should seem, that the swearing of the heir on the homage, being a solemn act in court in the presence of the lord or steward, would be tantamount to a positive admittance. See *Watk. Gilb.* 287. N. (*y*). and see also 4 *Burr.* 1955. in *Roe d. Noden v. Griffiths & al.* Arg.

(*z*) *Kitch. & Co. Copyh. ubi sup.* Sed vide *Moore*, 272. Alderman *Dixey's* case cited there, and *post*. p. [247.]

mission is occasioned by the heir; as if the lord make proclamation for him to come in and be admitted, and the heir does not do so before the third proclamation be made: here the law, perhaps, would permit the lord to avow on him by reason of the length of time now usual between the death of the ancestor and the third proclamation, as courts, at this day, are so seldom held; and the lord manifests his intention to admit him when he shall come and request it. But if the delay be occasioned by the lord, the avowing on the heir for rents or services, would, I conceive, be tantamount to an admission in itself; as it would certainly be acknowledging him as tenant. In the [247] former case, the law would not, perhaps, suffer the heir to avail himself of the avowal as an admittance, when it was the effect of his own neglect or refusal: yet, even in that case, there would be field for doubt, as the lord might have held his court oftener if he pleased (a).

Wherever any becomes entitled to the co-

(a) *Watk. N. cxxxv. to Gilb. Ten. 459.*

pyhold, by act of law, as an executor (*b*) a widow taking freebench, in cases in which Other person taking by act of law. no assignment is requisite (*c*); an husband in right of marriage (*d*), or by the curtesy (*e*); such person may enter, &c. as an heir at law might have done.

And the true distinction with respect to the heir or other person so taking by act of law, seems to be, as noticed by *Fenner* in the case of *Ever* and *Aston* (*f*), that, before admittance, the lord himself cannot claim any duty or service, as fealty, homage, relief, rent, or suit; but that this delay of admission shall not prejudice a third person. [248] If the lord accept fealty, &c. from the heir, &c. it would be an implied admittance; but

(*b*) See *Dyer*, 251. *Hauchett's* case.

(*c*) See *Watk.* on *Desc.* 53-4. notes. *Gilb. Ten.* 287-8. and notes; and *Watk.* N. xxv. to *Gilb.* 379.

(*d*) *Hauchett's* case, *ubi sup.* *Co. Copyh. s.* 56. *Tr.* p. 129. *Gilb. Ten.* 291. and *Watk.* N. cxxxix. p. 461.

(*e*) See *Watk.* on *Desc.* [1st ed.] 53-4, notes; and the books there cited: [and *supr.* p. [245]. note (*p*). See also 10 *East*, 583. *Doe d. Milner v. Brightwen.*]

(*f*) *Moore*, 272. This distinction was said to have been taken in the case of Alderman *Dixey & al.* 23 *Eliz.* in *C. B.*

whether the heir, &c. has been admitted or not, is relative only to the lord, and into which strangers have no necessity to inquire(g).

Surrenderee. But with respect to a surrenderee, who takes by the act of the party, the matter is wholly different. *He* is not tenant to any purpose before admission: he cannot even enter on the premises. The surrenderor continues tenant to the lord.—But we have already spoken on this subject in the chapter on surrenders(h).

Having thus seen what may, and what may not be done, before admittance, we come now to the consideration of the admittance itself.

Admittance defined.

“An admittance,” therefore, “is the lord’s acceptance of a person into the tenancy.”

It is the acceptance of a tenant.

And, first, it is an acceptance by “*the lord*.” for, as we have already observed, a

(g) See *ante*, p. [244].

(h) *Ante*, p. [100]. &c.

person could not be put into the tenancy without his consent (i): a copyholder, especially, who once actually held, and is still regarded as holding, his tenement at the will of the lord, could not, by the terms, become the lord's tenant, independently of that will. [249] The will of the lord is now, indeed, dwindled into form; but, as a form, it is still indispensable.

Yet the acceptance need not be a personal acceptance by the lord; the lord may accept him by his steward, or by the deputy of his steward.

But the admission of a copyholder differed essentially in one point from the ancient admission of a free tenant: for admission was once equally requisite with respect to the latter as the former. The free tenant could only have been admitted in the presence of, and with the consent, of his peers. Each frank-tenant, as *West* remarks (k), had

Need not be
coram pari-
bus.

(i) *Ante*, p. [230]. and see *Watk. Introd. on the Feudal Syst. Pref. to Gilb. Ten.* and notes.

(k) *On the Creation of Peers*, 63.

originally a negative on every person who was proposed by the lord to be admitted. But this did not hold as to copyhold tenants. The copyholder, if not properly a villein, was removed but little from that order of men, and was, at least, but a tenant strictly at will: he was not to be judged by his fellow tenants, as the freeholder was; the lord or his steward was the judge of his court; or, if he was amenable to a superior one, he was to be tried by freemen; as copyholders could not form a jury at common law. The presentment of his fellows was not essential to give power to the lord to resume his tenement; he might have seised it at his pleasure, whenever he chose to permit him no longer to hold. From hence, then, it must appear, that the same reasons did not apply to the copyhold tenant as did to the free, with respect to the admission of a new person into the tenancy. Hence the lord or his steward* may admit, as well out of court as in; since the approbation, or even the testimony, of the former tenants is not requisite. It were indeed most egre-

* *Kich.* 82. b.

giously absurd, to suppose the concurrence of others to be necessary, where the estates, equally of themselves as of the person about to be admitted, were absolutely dependant upon the will of the lord, not only as to their origin, but also as to their duration and extent.

The admission, however, of the new tenant out of court, should regularly be notified by the lord or his steward, at the next court-day, for the information of the tenants. This too was more immediately necessary in ancient days: as, in case the tenants should have known any objections to the person so admitted, of which the lord might have been ignorant, they might have informed him of them, from which he might have been induced to resume the estate, as having conferred it on a person who was unworthy of the grant. Add to this, that it must be regularly inserted on the court rolls of the manor; by a copy of which he is to hold (*l*).

But should be notified at the next court.

If the admittance be by the lord or steward out of court, a memorandum of such

[251]
Memorandum of an admittance made out of court.

(*l*) *Watk. N. cxi. to Gilb. Ten. 448-9.*

admittance should be made to the following effect :

Manor of } " BE IT REMEMBERED, that
Fairhurst. } on this the — day of —
 18—, &c. *W. H.* of, &c. came in his proper person, before me *E. M.* lord (or "steward" *as the case may be*) of the manor of *Fairhurst* aforesaid, and prayed to be admitted to all, &c. *To whom* I, the said *E. M.* as lord of the said manor, personally granted seisin thereof by the rod: (or "To whom the lord of the said manor, by me his said steward, granted, &c.") To hold to him the said *W. H.* and his heirs for ever, by copy of court roll, at the will of the lord or lords for the time being, (*or if the admittance be by the steward say in the common form*, "at the will of the lord,") according to the custom of the said manor; by the rents, duties, &c. And he was admitted tenant thereof ("by me the said lord,") in form aforesaid; and gave for his fine —: but his fealty was respited."

E. M.

Lord (or steward) &c.

At the next court this memorandum should be produced and enrolled :

" ALSO AT THIS COURT it was certified Entry on the rolls. by the said steward, that, out of court, and since the last court, *W. H.* of &c. was admitted by the personal acceptance of the lord of this manor, (or " of him the said steward,") to all, &c. which said premises had been before duly surrendered to the use of the said *W. H.* &c. (or " had descended to him the said *W. H.* as the customary heir of, &c.") Of which admittance a memorandum was made, and signed by the said lord, (or " steward") and now produced and read in court, in the words following, that is to say ;

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Manor of }
Fairhurst. } BE IT REMEMBERED, &c.

As the presence, therefore, of the tenants is not necessary on the admission of a copyholder, the lord (*m*) or steward (*n*), may admit out of court as well as in. Admission out of court and by whom it may be.

(*m*) 4 Co. 26. b.

(*n*) *Kitch.* 92. b. 1 *Roll. Abr.* 505. *Copyh.* (V) pl. 4.

It is said, indeed, (o) that an under-steward cannot admit out of court: but it is repeatedly laid down in our books, (p) that a deputy may, when properly constituted, "do any act which his principal might have done; and that less power he cannot have (q)."

[253] There does not appear any good reason then, why there should be a particular exception with respect to *admitting* a copyholder (r), as it is merely a ministerial act.

Out of the
manor.

Now wherever an admission would be good out of court, it seems to follow, as a necessary consequence, that such admission would be good out of the manor (s). And it is acknowledged that the lord himself may admit out of the manor (t): and though it is said that a steward cannot do so; yet most

(o) *Bro. Court Bar. pl. 22. Ten. per Copie. pl. 26. Co. Copyh. s. 46. p. 107. Kitch. 82. b.*

(p) 1 *Lord Raym.* 659. *Parker & Kett.* 1 *Salk.* 95. S. C.

(q) See 1 *Lord Raym.* & *Salk. ubi sup.*

(r) See *Co. Copyh. s. 46. Tr. p. 107.*

(s) See 1 *Salk.* 184. *Dudfield & Andrews*, and and *Watk.* No. cxi. to *Gilb. Ten.* 448.

(t) 4 *Co.* 26. b. *Melwick's case.*

of the cases evidently suppose such admission to have been at *a court* held out of the manor (*u*). Now it is clear that *a court* cannot be held out of the manor, unless it be by special custom *, as where a court is held in one manor for a whole honor in which there are several manors (*x*); and,

(*u*) 4 Co. 26. b. 27. a. *Clifton v. Molineaux*.

* If a man, having two manors, would willingly have the tenants of both to do suit and service to one court, this is but lost labour in the lord to practice any such union: for, notwithstanding this union, they will be still two in nature, howsoever the lord covet to make them one in name: *and the one manor hath no warrant to call the tenants to the other manor*, but every act done in the one to punish the offenders in the other, is traversable. *Yet, if the tenants will voluntarily submit themselves to such an innovation, and the same be continued without contradiction, time may make this union perfect*, and of two distinct manors in nature make one in name and use. And such manors peradventure there are thus united by the consent of the tenants and continuance of time, but the lord's power of itself is not sufficient to make any such union, *causá qua supra*. But if one manor holdeth of another *by way of escheat*, these two manors may be united together, *fortior enim est dispositio legis quam hominis*. Co. Copyh. s. 31. Tr. 47-8.

(*x*) Cro. Car. 367. *Seagood v. Hone*. Co. Litt. 58. a.

therefore, this reasoning does not apply to *an admittance*, merely as an admittance, as an admittance may most certainly be *out of court*. And as to the case of *Tukeley v. Hawkins* (y), so far as it relates to this point, it seems to be completely answered by the reasoning in that of *Dudfield v. Andrews* (z), which appears to apply as strongly to an admission as to a surrender.

Who may admit.

We will now proceed to inquire—Who may be such lord, steward, or under-steward, as may admit a copyholder?

Lord.

And here a distinction is frequently made, with respect to the lord, between an admission on a grant and on a descent or surrender. But, in the first instance, the incapacity goes rather to the power of *granting* than of *admitting*: for if the lord has power to grant, he certainly has power to admit. If the grant be invalid, the admission on such grant would be of no avail. Besides: admission is generally made at the time of the

(y) 1 *Lord Raym.* 76.

(z) 1 *Salk.* 184.

grant by the lord who grants; and if it be not actually and formally made, the grant itself would be sufficient to warrant the grantee to enter; as the very act of making the grant necessarily supposes the acceptance of him as a tenant.

In the case of descents and surrenders, the lord, the steward, or under-steward, are merely instruments: They are compellable to admit if ostensibly such; and the tenant is not to inquire into the legality of their title.

[255]

If a person therefore be lord *de facto* it is enough: For whether he be lord by right or by wrong, as a disseisor, &c. (a); whether he be seised in his own right, or in the right of another (b); whether he have an absolute or defeasible (c) title; whether he be tenant in fee, in tail (d), for life, years, at will, or

Lord *de facto*.

(a) Co. Litt. 58. b. 1 Co. 140. b. 4 Co. 23. b. 24. a.

(b) See of a Guardian, Co. Litt. & 4 Co. *ubi supra*. & Godb. 143. Ca. 177.

(c) Co. Litt. 58. b. 4 Co. 23. b. 24. a.

(d) 4 Co. 23. b.

by sufferance (*e*); whether he be an infant, or of full age, &c. (*f*) it matters not: His admittances being, in these cases, only ministerial, they will be good, and obligatory on his successors or those having right.

Steward.

So the law is not very curious in examining the imperfections of the steward's person, nor the unlawfulness of his authority; for be he an infant, or *non compos mentis*, an idiot, or lunatic, an outlaw, or an excommunicate, yet what things soever he performs as incident to his place, can never be avoided for any such disability, because he performs them as a judge, or at least as custom's instrument; and for his authority, though it prove but counterfeit if it come to exact trial, yet if in appearance or outward
 [256] shew it seems current, that is sufficient. As if I grant the stewardship of my manor of *Dale* by patent, and in the patentee's absence, a stranger by my appointment keeps court, this is authentic. If a grant of a stewardship be made to one, and for some

(*e*) 4 Co. 23. b. 24. a. Co. Litt. 58. b.

(*f*) 4 Co. 23. b.

fault or defect in the grant it is avoidable; yet courts kept by him before the avoidance shall stand in force; and whatsoever he did, as steward, is ever unavoidable (*g*).

If such steward be appointed by parol only, his admissions will be equally valid as if he had been appointed by an instrument however solemn; and even though his appointment be avoided for such cause: As if he be appointed by parol by a corporation; though a corporation cannot constitute such officer without writing; And so also if the steward be retained by parol by the king's auditor or receiver (*h*):

So an under steward may be appointed by parol (*i*): And such deputy may act either in his own name or in the name of his principal (*k*). Under steward, &c.

(*g*) *Co. Copyh. s. 45. Tr. p. 104-5. Cro. Eliz. 699. Harris v. Jays:*

(*h*) *Ibid. s. 45. and see Moore, 112:*

(*i*) *Ibid. s. 46.*

(*k*) 1 *Lord Raym. 658. Parker & Kett. 1 Salk. 95. S. C.*

[257] So an understeward may authorize another to do a particular act, as to keep a court(*l*). And even if a person was not expressly authorized to do a particular act only, but appointed an under-deputy generally, and so the appointment be absolutely invalid, and, consequently, such person have no true or legal authority at all, yet his admittance would be good (*m*).

So if a chief steward make a deputy and die, though the deputation would necessarily be at an end, since a derivative power cannot exist when its source has ceased, yet the admissions made by the deputy after the death of his principal would be equally valid as if made in his life time (*n*).

But if a stranger, without the appointment of the lord, or consent of the right steward, or without any colour of authority, will, of his own head, come into a manor

(*l*) 1 *Loon*. 288. *Lord Dacre's case*. 1 *Lord Raym.* 661-2.

(*m*) See *Parker & Kett*. 1 *Lord Raym.* 1 *Salk. Comyns's Rep.*

(*n*) *Moore*, 112.

and keep a court, it seems that a performance of any judicial duty, or the executing of any act whatsoever, will not be warranted, especially if the court be kept without warning given to the bailiff by precept, according to the custom (o).

And as the lord is not obliged to admit the tenant in his own person, so it is not necessary that the tenant be *personally* admitted. The lord, if he pleases, may admit him by attorney (p). Though it is said that he is not *compellable* to admit him by attorney; as a person cannot swear his fealty by another (q). In the case of *femes covert* and infants taking by descent or surrender to a last will he is now compellable to admit them by attorney in certain cases, by statute (r). And, as it is now become usual to respite or pardon fealty, such fealty being now merely formal, it should seem that the courts would compel him, under

[258]

Admittance
by attorney.

(o) *Co. Copyh. s. 44. Tr. p. 105.*

(p) 9 Co. 76. a. in *Coombe's case*.

(q) *Ibid. 2 Rep. in Chanc. 56. Floyer v. Hedingham.*

(r) 9 Geo. cap. 29.

certain circumstances, in other cases to admit by attorney and to respite or waive his fealty: as in cases of sickness, &c. when the heir, &c. could not come in person: or at least prevent a forfeiture from incurring. Thus, where a quaker refused to take the oath of fealty, the court relieved (s).

Secondly, an admittance is "*the acceptance of a person as tenant.*"

Admission
how to be
made.

We shall, therefore, proceed to inquire how such acceptance is manifested; and what shall amount to such acceptance.

[259]
Express.

And first of an express and formal admittance*.

Grantee.

And this may be in or out of court. When a grant is made to a person, the very execution and delivery of that grant to him is, in itself, an acceptance of him as a tenant, from the very nature of the thing: the giving him the rod, or accustomed symbol, is the investing him with the *possession of the te-*

(s) *Preced. in Chanc.* 574. *Edmore v. Craven.*

* Lord grants. See *post.* [268].

ments, and not the acceptance of his person.

When a copyholder surrenders into the hands of the lord or steward, the surrender is expressly received into the tenancy by the lord or steward saying to him, "I, as lord of this manor," (or "I, as steward of this manor, do, for, and in the name of, the lord,") "admit you, *A. B.* as tenant to all that, &c. which have been now surrendered into my hands, by *C. D.* to your use: TO HOLD to you and your heirs, by copy of court roll, at the will of the lord, according to the custom of this manor, by the rents, duties, and services, therefore due and of right accustomed; and according to the form and effect of the said surrender; And do put you, into the seisin of the same premises by the delivery of this rod."

Surrenderer.

Manner of admitting.

The new tenant then receives the rod, or other symbol of possession; and pays his fine; and is sworn to fealty, unless his fealty be pardoned or respited.

Seisin and fealty.

The proceedings are thus entered on the roll:

[260]

Entry on the roll.

“AND the said *C. D.* being present in court in his own proper person, prayed to be admitted tenant to all and singular the said premises so surrendered to his use, and according to the form and effect of the said surrender: TO WHOM the lord of the said manor personally, (or “by his said steward,”) granted seisin thereof by the rod: TO HOLD to him the said *C. D.* and his heirs for ever, at the will of the lord, according to the custom of the said manor, by the rents, duties, and services, therefore due and of right accustomed. And he was admitted tenant thereof; in form aforesaid, and gave to the lord for a fine — ; and did his fealty.”

Livery of seisin;

by the rod or verge.

On being admitted tenant, the person so admitted is put into the seisin or possession of the premises. This is done by a symbolical livery; most usually by a rod, wand, or verge; hence are copyholders frequently denominated “tenants by the verge (*t*).”

Proper and improper investiture.

A symbolical livery became, from its convenience, adopted at a very early period.

(*t*) See *Litt. s.* 78. and *Co. Litt.* 61. a.

Hence the proper and improper investiture of ancient days. The immediate tenants of the king who held *per baroniam*, were usually *enrobed* before their peers on the occasion. In early times the tenant was obligated to assist his lord with his counsel. [201] The tenants *in capite* formed the court baron of the realm. The dignity of the peerage was attached to their territories; and the tenant received the insignia of his order on receiving the grant of his lands. It was tantamount to the proper seisin as to the fixture of property; it was of equal publicity to his peers; and it supplanted it. And from this circumstance of *enrobing* or *investing* the tenant, came the term of *investiture*.

In other cases, the symbol was generally arbitrary; and often of the most extravagant nature: a sword, a lance, a knife, a glove, the key of a church, and even a drinking cup, or a lock of the grantor's hair was adopted as the symbol of possession. The rod, staff, or verge, however, was the most common; and which most probably was no other than that borne by the officer of the court, and consequently, always at

Arbitrary
symbols.

hand: though its origin, indeed, has been deduced from a more ancient and sacred source (*u*).

Coram partibus.

The livery of seisin by symbol in full court, was frequent in ancient times on the grant of freehold property. We have already noticed it as to the tenants *in capite*: and it was equally usual on the grants of inferior lords (*w*).

[262]

The usual symbol should be observed.

When a particular symbol has been immemorially used in a manor, it has been urged that a surrender by another symbol would not be valid. Thus a custom was set up to surrender by the *verge*; and a surrender was alleged as being made by the delivery of a *knife*: and the council of the marches of *Wales* proceeding to try the custom, a prohibition was granted by the Court of King's Bench, on the ground that a custom was only triable at common law. But no intimation is given in the report of the

(*u*) See *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 4. p. 389. 4to. edition.

(*w*) See *Diss. Pref. Mad. Formulæ Angl.* s. 13.

case as to the opinion of the court with respect to the operation of the surrender, or the validity of such a custom ; but only that if there could be such a custom, it was not within the jurisdiction of the council, but triable at common law (x).

However, there can be no doubt but that if the usual symbol be not used, and a custom requiring that very symbol be good at law, that a court of equity would relieve on a valuable, a moral, or meritorious consideration. Indeed, it would be very imprudent to depart from the accustomed mode ; and the particular ceremonies which have been long adhered to, ought not to be capriciously forsaken.

When the tenant is admitted, he usually *Fine.* pays a fine to the lord. But this is no part of the admission, but the consequence of it : nor is it even a consequence of necessity ; [263] for the lord may not only remit or waive it, (though such remittance or waivure would,

(x) *Cro. Car.* 597. *Aspye v. ———*.

indeed, imply its existence,) but in many manors no fine is due in certain cases; as in those on the admission of an heir at law, or of a person who had been before admitted to other premises held of the same manor.

“y”

But, however, when any fine is due of the species we are speaking of, it is due as a consequence of the admission. For though an admission may be without a fine, a fine cannot be due without an admission. “Admission is the *cause* of the fine:” (y) and therefore the fine must be the *consequence* of the admission. Hence the lord or steward cannot be warranted in refusing admittance till the fine be paid, for till admittance it cannot be due*. But the doctrine of fines will be the subject of our next chapter.

(y) 4 Co. 28. a. 2 Durnf. & East, 485. *The King v. the Lord of the Manor of Hendon*; and next *Chap. of Fines*. p. [286].

* [And it has accordingly been held, that a covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser: for the title

The next thing to be observed on admission is the oath of fealty.

In the days of barbarism and ferocity, when man estimated his right by his power, and regulated his honesty by the length of his sword; when nation supplanted nation in its possessions, and clan invaded clan without compunction or shame; when glory was attached to rapine and desolation, and each mighty chieftain prided himself on being the greater thief, the chieftain became naturally jealous of his neighbours. He was conscious that if his arm was against every man, every man's arm would be against him. Settled among the injured inhabitants of a country whom he had plundered and distressed, he was careful of his own strength. But he was not only apprehensive of the vengeance of the oppressed, he was equally jealous of his fellow lords. Hence he bound his followers by oath to be true to his person; and exacted the most

Origin of its institution.

[264]

is perfected by the admittance of the tenant, and the fine is not due till *after* the admittance. 1 *East*, 632. *Graham v. Sime*, & *vid. infr.* p. [286-7].]

solemn promises of fidelity from him who was about to be admitted into the tenancy.

Tenant at will was not sworn unless by custom.

A tenant strictly at will was not to swear fealty, as the lord might remove him at pleasure. A copyholder, however, not being considered as a tenant strictly at will, but as irremovable while he performed his services, was, in pursuance of custom, duly sworn (x).

Who may take fealty.

It should seem, that any lord who has power to admit, has power to take fealty. But he need not take it in person: the oath may be administered by his steward or bailiff (a).

Who may swear it.

[265]
Not by attorney.

But the tenant cannot make his fealty by another; for a person cannot swear by attorney (b); though instances of one person swearing in the name of another are not wanting (c).

(x) See *Fitz. Abr. tit. Serment. Co. Litt. 63.*

(a) *Co. Copyh. s. 20. Tr. p. 15. Litt. s. 92.*

(b) *Co. Litt. 68. a.*

(c) *Harg. N. (5) to Co. Litt. 68. a. See the stat. 33 Hen. 6. c. 6.*

An infant, it is said, cannot be sworn to fealty (*d*). But it should seem that a feme covert should be sworn. For in the cases of copyholds the feme covert only is admitted (*e*) and not the husband; and, therefore, she only must do fealty. The statute of *George the First* (c. 29.) has made no provision with respect to the oath.

Infant, *feme-covert*.

It is now, however, seldom administered in these or in other instances; but when the oath is taken it may be in this form:

“ You shall swear that, as to the tenements to which you have been now admitted, you will be a true and faithful tenant to the lord of this manor. So help you God.”

Form of the oath.

As fealty is now only requisite for the preserving and evidencing the existence of the subsisting tenure, it is become usual to respite it, on the admission of a copyholder; as his tenure is sufficiently evidenced with-

(*d*) 2 *Inst.* 11. *Co. Litt.* 65. a. and the books there cited.

(*e*) See 1 *Hen. Blackst.* 341-2. *Compton v. Collinson*.

[266] out it by the regular enrolments of such admittance. And as it must, when taken, be by the *oath* (*f*) of the tenant, it should never be insisted on: for such a solemnity ought not to be made subservient to form.

When such oath, however, is to be administered, it cannot be worded too simply and general. It ought not to include things which compose not its essence. In many forms of the oath the tenant is made to swear, to do his services, to pay his rents and dues, &c. This ought not to be done. The lord has, perhaps, a more effectual security for them by the laws of the land, by seisure for non-performance, &c. than in the conscience of his tenant. Where the end, therefore, may not only be equally, but better effected, recourse should not be had to so solemn and sacred a ceremony.

The clause, indeed, relative to the performance of services is to be found in forms

(*f*) But a court of equity has relieved in the case of a *quaker*. See *Preced. Chanc.* 574. *Edmore v. Craven*, cited.

prescribed several centuries ago. It is included in that contained in our statute book, of the time of *Edward* the Second, which form is thus :

“Hear you my lord *R.* that I will be faithful and true, and faith to you will bear, for the tenements which I claim to hold of you; and that I will lawfully acknowledge and do to you the customs and services that I ought to do at (or according to) the terms assigned: So help me God and the saints (*g*).” [267]

The villein also swore that “he would be justified by his lord in body and goods.”

In forms, however, of more ancient days, the clause we have animadverted on is not found: that given us by *Bracton* (*h*) is thus:

(*g*) “Quaunt fraunk homme ferra feaute il tendra sa main outre le livre & dirra issint; ceo oiez vous monsieur *R.* que jeo vous serrei foial & loial & foy vous porterei des tenementz qe jeo clayme de vous, & loialment vous conuestrei & loialment vous ferrei les custumes & les services qe faire doie as termes assignez; si moy eide dieux & les seintz.”

(*h*) *Bract. Lib.* 2. cap. 35. sec. 9. fol. 80. a. “Hoc

"Hear thou this my Lord *N.* that I will bear faith to you of life and member, body and goods, and of earthly honour, so help me God and his Holy Evangelists."

Fealty is sworn in respect of the tenements.

[268]

When a person did homage he never repeated it; its obligation was deemed commensurate with his existence. If he had even parted with his tenements, his promise of amity was not annulled (*i*). If he acceded to other tenements no further homage was performed; though he repeated his fealty. For though he could not twice become the lord's man, yet the self same tenant might several times do fealty unto the self same lord: and, therefore, if a copyholder surrender *White-acre* to me, I must do fealty for *White-acre*; and if he afterwards surrender *Black-acre* to me, I must do fealty for *Black-acre* also, though to the self same lord (*k*).

audi domine *N.* quod fidem vobis portabo de vita & membris, corpore & catallis, & terreno honore: sic me Deus adjuvet & hæc sancta dei evangelia."

(*i*) *Watk. on Gilb. Ten.* 403. No. lix.

(*k*) *Co. Copyh.* s. 21. *Tr.* p. 16.

We come now to the inquiry into what shall amount to an admittance; or into an admittance by implication. Admittance by implication.

An admittance need not be in any particular form of words*: for, if we look to the reason of the thing, we may conclude, says Chief Baron *Gilbert* (1), that any thing that expresses the lord's consent to the surrender should amount to an admittance; for it is his consent only that is requisite after the surrender, to make the surrenderee a tenant; and what matter is it whether that be done by *dominus concessit & admissus est*, or by an act that amounts to as much?

Thus if the lord says to the surrenderor, "You have surrendered to the use of such an one, to which surrender I agree;" it will [269] be a good admittance of the surrenderee (m).

So if the lord, *knowing of the surrender*,

* A. surrenders to the use of B.—lord *grants* to B.—good. See *Calth.* 99.

(1) *Ten.* 282-3.

(m) 3 *Bulst.* 219. *per Cur.* in *Rosewell & Welch*, and *ibid.* 232. in *Elkin & Wastall*.

accept rent (*n*), fine (*o*), or fealty (*p*) of the surrendereë, it will be a good admittance.

So it should seem that an avowry on the heir or swearing him on the homage would be a sufficient admittance, as it would be acknowledging him a tenant (*q*).

So if *I. S.* surrender to *I. N.*; and *I. N.* before admission surrender to *I. D.*; and *I.*

(*n*) 1 *Roll. Abr.* 505. *Copyh.* (x) pl. 2. *Froswell & Welch.* 3 *Bulst.* 214. 217. &c. *S. C. Godb.* 268-9. *S. C.* See *Cro. Jac.* 403. *S. C. contra*; but in the report in *Cro. Jac.* it is said that the acceptance of rent by the hands of *cestuy que use* could give no interest to him till the surrender was "*presented in court.*" But we have before seen, (*ante*, p. [79].) that the lord may admit, if he pleases, *without a presentment*: and it seems to be implied in this very report of the case that it would be a good admittance if it had been presented; and, consequently, if the lord could dispense with the presentment, this distinction falls to the ground: and the doctrine, as found in *Rolle*, *Bulstrode*, and *Godbolt*, stands unimpeached, as well as upon the more solid basis of rationality.

(*o*) See 3 *Bulst.* 239. in *Rawlinson v. Greaves*, and see *Dyer*, 292. a. pl. 68.

(*p*) See *Dyer*, 292. a. pl. 69.

(*q*) See *ante*, p. [246].

D. be admitted: the admittance of *I. N.* [270] would be implied, as it should seem from the better authorities (*r*). For as Lord *Coke* argues on another occasion, “ The lord’s acceptance of the surrender is *quasi* an admittance; for in that he allows him to make a surrender, he thereby admits him to have [an estate] whereof to make a surrender (*s*).”

Thirdly.—“ An admittance is the acceptance of a person *into the Tenancy.*”

When, therefore, the person is not put into the *Tenancy* no admittance can take place. Admittance is the acceptance of a tenant.

If a copyholder surrender to the use of *A.* Trust. in trust for *B.*, *A.* will become *tenant* to the lord, and, consequently, must be admitted: but *B.* taking only an equity, cannot possibly be the object of admission, since he has nothing to do with the tenancy, which is filled by *A.* So if *A.* die, *his* heir must be admitted; but if *B.* die, *B.*’s heir, as

(*r*) See 3 *Bulst.* 237. *Rawlinson v. Groves.* *Gillb. Ten.* 222-3. and *Watk. N.* cxxx. p. 457.

(*s*) See *Cro. Eliz.* 504. *Gyppen v. Runney.*

such, can no more need admittance than *B.* himself could have done (*t*).

Condition. So if a surrender be made 'on condition, the surrenderee must be admitted within
[271] the prescribed time (*u*): and if the condition be fulfilled on the part of the surrenderor, or broken on that of the surrenderee, the surrenderor shall be in of his old estate, and consequently require no new admittance; he being already in the tenancy (*w*). But if the surrenderor fulfil not the condition,

(*t*) See *Moore*, 890. *Rivet's case*. 1 *Vern.* 441. *Trinity College Cambridge v. Browne*. And *post.* ch. 7. p. [293]. [Devise of a copyhold to two and their heirs, (and who appear to have been accordingly admitted,) *in trust* to permit *A.* to enjoy the same, or to pay to or permit her to receive the rents during her life, for her separate use, and subject to such estate of *A.* to such persons, &c. as *A.* should by her will appoint, and in default of appointment, to the right heirs of *A.*—An appointee under the will of *A.* takes a *legal* estate, although the trustees had never surrendered to the use of the will of *A.* nor had *A.* been admitted tenant. 5 *Taunt.* 382. *Doe d. Woodcock v. Barthrop*. See also as to trusts, *supr.* p. [212] and *infr.* p. [293].]

(*u*) See *ante*, ch. 3. p. [84], &c. [116], &c.

(*w*) 9 *Co.* 107. a. *Kich.* 123. a. *Co. Copyh.* a. 56. *Calth.* 60. 67. *Cro. Eliz.* 239.

or the surrenderee infringe it, the estate will become absolute in the latter; and, consequently, the former will have only an equity of redemption which lies not in tenure (*x*); and if the estate afterward come to the original surrenderor, he must be admitted to it as if it had never been in him (*y*). Equity of redemption.

If a copyholder in fee surrender to a person for life, or for any other particular estate, he shall, on the determination of such estate, be in of his old seisin, and, consequently, need no admittance (*z*). Reversion.

If a person have only an authority or power, but no legal interest in the copyhold, no admission can be necessary; for he has nothing to do with the tenancy (*a*): but the appointee must be admitted, as *he* will become tenant to the lord (*b*). Authority.

(*x*) See *ante*, p. [120]. and next chap. p. [294].

(*y*) 12 *Mod.* 49. *Benson & Scott*, and *ante*, [121].

(*z*) 9 *Co.* 107. a. & *post.* [287-8].

(*a*) *Cro. Jac.* 199. *Beal & Sheppard*, and *post.* [294].

(*b*) See *ante*, [105]. & *post.* ch. 7. [294-5].

[272]
Guardian.

The bailiff who is only a pernor of the profits and not tenant, needs no admittance(c). Nor shall a guardian, as such, however appointed, be admitted himself; *but the infant by such his guardian*: The infant, and not his guardian, being tenant to the lord.

Survivor of
joint-tenants.

If there are several joint-tenants who have been admitted, and one die, the survivors continue in of their former admittance: no new admittance can be necessary as there is no new tenancy created (d).

Coparceners
and tenants
in common.

But it is otherwise with respect to coparceners and tenants in common; for they transmit several estates; and the person taking from them will be in of a new seisin (e).

Widow, &c.

A widow taking her freebench, or an husband his curtesy, or on surviving his wife who was a termor for years, are said to continue the seisin of the deceased, and, there-

(c) *Co. Copyh* s. 56. *Tr.* 128.

(d) *Co. Copyh.* s. 56. *Tr.* 130. *Kitch.* 122. a.

(e) *Co. Copyh. ubi sup. Calth.* 64. and *post.* [298.]

fore, to require no new admission ; though some assert it to be dependent upon custom (*f*).

As the tenant could not marry without the consent of the lord, he could not, by reason of such marriage, introduce a person into the tenancy but by the lord's approbation. If the lord approved of the individual it was a direct acceptance of such person into his allegiance, family, or tenancy. No further admission could have been requisite: he had already accepted the person as worthy of his confidence, and as entitled to his protection. [273]

On the marriage of a feme copyholder, the husband becomes entitled to the possession of the lands,—to receive the rents and profits ; and if she took by descent he may even enter before admittance (*g*). He too must return the services to the lord (*h*) : and it is

(*f*) See *post.* ch. 7: p. [299]. and the books there cited.

(*g*) See *Watk. on Desc.* 53-4. Not. and the books there cited.

(*h*) *Calth.* 52. *Cro. Eliz.* 149. *Hedd v. Chalener.*

the husband and not the wife, who is to do suit and appear upon the homage in court (i). With respect to freeholds, the husband before issue had, did homage together with the wife; though *he* only repeated the words: yet, after having issue, he did homage alone (k). But as to copyholds, the having issue does not, generally speaking, seem essential to curtesy. Without a special custom, copyholds are not subject to curtesy at all; or, in other words, the husband is not entitled to them after the death of the wife. And in alleging such custom when it does exist, the having issue is seldom lain as a requisite (l). In such cases, therefore, he is as much fixed in the tenancy *before* issue, as much *initiated*, as the free-tenant would have been afterwards.

(i) See *Cro. Eliz. ubi sup.* And this is the usual practice.

(k) See *Co. Litt.* 66. a. and 2 *Bl. Comm.* 126. ch. 8. and see *F. N. B.* 257. F. & Notes (b).

(l) In a great number of manors the custom runs, generally, that the husband surviving the wife shall have her lands, &c. In other, and chiefly more modern, customals, it is expressly said, that he shall have them "whether issue or no issue."

If the husband was a copyholder in his own right, he, of course, did suit; but when he died, his wife became entitled by custom to retain the lands, and then she sat on the [275]

Hamagiu. Ric. Wood, in Jure Uxor. } Jur.
Stephūs Fox, in Jure Uxor. }

homage (*m*); then she became a *bencher* and did suit.—If the wife had a term for years in a copyhold, the husband became entitled to it on her death by a kind of survivorship, as in the case of real chattels at common law (*n*).

In these cases, therefore, the necessity or utility of an admittance of the husband on the death of the wife, or of the wife on the death of the husband, seems utterly precluded. The lord, by consenting to the marriage, knew of, and accepted, the person so married to his tenant, as one of his own people. Such marriage, and cohabitation on the particular lands within the manor (for copyholders were rustics and employed in husbandry,) were of sufficient notoriety and publicity as to the other tenants. Add

(*m*) For a woman may sit upon the homage in a customary court, or even in a court baron to present, &c. But she shall not sit in the latter court as a judge to try issues, &c. See 2 *Inst.* 119. and *Watk.* No. clxviii. to *Gilb. Ten.* 475. See also *Mirr.* cap. 5. sect. 2. and *Watk.* N. x. to *Gilb. Ten.* 357.

(*n*) See *Hauchett's case.* *Dyer*, 251. a. pl. 90, &c. *post.* ch. 7. [300].

to this, that a fine being mostly paid on marriage it would have been unreasonable for the lord to exact another in consequence of a new admission (*o*). In all points there was no necessity or reason for an admittance of the one on the death of the other. The survivor was already known to the lord and approved of by him; and the legitimacy of the possession was equally notorious to the tenants of the manor. [276]

Again; though a copyhold be limited to several persons successively by way of remainder, the admittance of the particular tenant will be the admittance of all; though he be only tenant for years: for the particular limitation and remainders over, form but one estate at law (*p*). The seisin extends to the remotest remainder-man; and those in remainder may surrender their portions (*q*), or enter when their estate falls into

Particular
estate and
remainders.

(*o*) *Litt. s.* 174. & 209. *Co. Litt.* 117. b. 139. b.

(*p*) 4 *Co.* 23. a. 1 *Vent.* 260. *Batmore & Graves.* 1 *Mod.* 102. 120. S. C. 2 *Lev.* 107, &c. &c. See *post.* ch. 7. Of Fines, p. [296].

(*q*) *Cro. Eliz.* 504. *Gyppen & Bunney.* 3 *Leon.* 239. *Butler & Lightfoot.* 4 *Ibid.* 111. *Hegger & Felston.* *Cro. Jac.* 31. *Auncelme v. Auncelme.*

possession, though they never were admitted personally themselves*.

Reversion. A reversioner also may surrender (r) during the existence of the particular estate; or, if the particular estate determine, he shall be in *statu quo prius*(s); for a reversioner continues in of his original seisin.

[277]

Surrenderee
of a remain-
der or rever-
sion.

But if the particular tenant, remainder-man, or reversioner, surrender to the use of another, or die and the estate descend, the surrenderee or the heir must be admitted;

* If the admission of the particular tenant was not that of the remainder-man, so as to *vest* the remainders, the remainders would be contingent till the actual admission of the remainder man, which would not be till *after* the determination of the particular estate. Besides, the remainder man would not be in the tenancy, and consequently the lord could not enforce the admission of the heir or such remainder-man, nor consequently claim a fine, (see 3 *Mod* 221. *King v. Dilliston*.) nor could the remainder-man alien. Qu. If the lord admit the remainder-man without admitting the particular tenant,—whether it would not be an admission in him also?

(r) See *ante*, ch. 3. p. [38].

(s) 9 Co. 107. a.

for the original seisin cannot extend to them (t).

So, if a copyhold be surrendered to the use of two or more persons jointly, the admission of one of them will be the admission of all; as they all compose but *one tenant* to the lord (u). Joint-tenants.

Each being seized *per mie et per tout*, either of them may release to his companions, and no further admission of them will be requisite; as the tenancy would not be altered by the secession of the individual (w).

So, if one die, the others take his share, and continue in on the original admission (x).

(t) *Fitz. Recov. en Value*, 13. and see *Watk. Gilb. Ten.* No. lxxvii. p. 417. and *post.* ch. 7. Of Fines, p. [297].

(u) *Co. Copyh.* s. 85. *Tr.* 82. *Kitch.* 122. a. 2 *Wils.* 162. *Roe v. Hutton.* and *post.* ch. 7. p. [298].

(w) *Winch.* 3. *Wase & Pretty.* *Watk.* No. lxxix. to *Gilb. Ten.* 411. *Co. Copyh.* 35. *Tr.* p. 82. *Hetley*, 150. in *Mortimore's case.*

(x) *Kitch.* 122. a.

Coparceners. And as several coparceners are but one tenant (*y*), one admission will suffice for all of them.

[278] There is, indeed, a *dictum* of Lord Kenyon to the contrary, in the case of *Doe d. Tarrant v. Hellier* (*z*), that, though one joint-tenant fills the tenancy, it is not so as to coparceners: yet if this be law, it would, I apprehend, be no small difficulty to reconcile it with former decisions (*a*).

In many manors, * in various parts of the kingdom, particularly in *Suffolk* and *Essex*, it is usual to admit coparceners together and to take single fees. And in *Ali-*

(*y*) Vide *Brit. cap. 119. f. 270. b. Fleta, lib. 6. c. 1. s. 17. Litt. s. 241. Co. Litt. 67. a. &c. 163. b. &c. 3 Leon. 13. Ca. 30. Bro. Coparceners, 3. Stat. Hibern. 14 Hen. 3. 2 P. Wms. 614, &c. &c.*

(*z*) 3 *Durnf & East*, 165.

(*a*) See the books before cited in (*y*), and the second resolution in the case of *Morris & al. v. Prince. Cro. Car. 521. Et vide Liber Assisarum, 209. b. Pasch 34. Ed. 3. pl. 13. Coparceners join in avowry, ejectment, &c. 1 Id. Raym. 64. Hedman v. Bates, & 726. Boner v. Junor.*

* See Appendix, No. III. *Customs of Weardale.*

son's case (*b*) the Lord Chancellor decreed that a surrender should be made from a trustee to two daughters, who were heiresses to the premises; and that they should be *admitted as coparceners*.

Coparceners may, indeed, be admitted severally, and this is frequently done. And the reason for so doing is obvious, as to the steward, since it multiplies his fees. The fine, indeed, would be the same, whether they were admitted together or separately; since, if they were admitted separately, the single fine would only be apportioned; but the fees would be increased according to the number of persons admitted (*c*). [279]

If coparceners are admitted together, it should seem that they may *release* to each other; as coparceners may release at common law (*d*): and, if so, no further admission can be necessary any more than in the

(*b*) 6 *Mod.* 62.

(*c*) And, what is of consideration, the *stamps* would now be multiplied on such separate admissions. See stat. 37 *Geo.* 3. cap. 90. s. 11 & 12.

(*d*) *Co. Litt.* 273. b. *Gilb. Ten.* 73.

case of joint-tenants. For a release of a copyhold can only be good to those who are already in the tenancy (*e*).

But, though coparceners *take* but one estate, they *transmit* several to their heirs; and, therefore, if one die, the others, or the heirs of the deceased, must be admitted to the portion which so devolves (*f*): *a fortiori*, if one coparcener surrenders to a stranger, such stranger must be admitted; since he cannot possibly be supposed in of the original seisin. And so also if one coparcener *surrender* to the use of the others, (as she may do, as one might have *enfeoffed* the others at common law) (*g*), the others must be admitted to the portion so surrendered: for of that portion they would be in by the coparcener so surrendering, and not by their common ancestor, and, therefore, of a new seisin.

[280]

(*e*) 1 *Leon.* 103. *Wakeford's case.* *Gilb.* 300. 311. and *post.* ch. 7. Of Fines, p. [292].

(*f*) *Co. Copyh.* s. 56. *Tr.* 130. *Calth.* 64. *Watk.* No. clxxiv. to *Gilb. Ten.* 478.

(*g*) See *Gilb. Ten.* 73.

But tenants in common taking several estates, they must be severally admitted: here being not only a plurality of persons but of tenants also, as the terms imply (*h*). And, consequently, if one tenant in common surrender to another, or die, the surrenderee, or the heir, must be regularly admitted (*i*).

Tenants in
common.

If a copyholder surrender his copyhold to the use of the lord, the interest of the copyhold will be sufficiently vested in the lord immediately upon the surrender without any other act done; for the lord cannot admit himself (*k*).

Lord.

Admission is an initiation into the *tenancy*, is an acceptance of *a tenant*; and at the same time investing the person admitted with the corporal possession of the lands.

(*h*) See 1 *P. Wms.* 21. 1 *Lord Raym.* 631. [6 *East*, 476. *Attree v. Scutt.*] And *post.* p. [304].

(*i*) *Co. Copyh.* s. 56. *Tr.* 130.

(*k*) See *Co. Copyh.* s. 38. *Tr.* 85. and *Suppl.* s. 1. p. 145. and see 1 *P. Wms.* 17. *Lex Custumaria*, 109. ch. 13.

[281]

Hence then is the lord incapable of admission. He cannot be a tenant: he cannot hold of himself: *nemo potest esse tenens et dominus* was the maxim of early days: and as to the transfer of the corporal possession of the lands, it was accomplished by the delivery of the rod as a relinquishment of the seisin.

The lord in admitting is only an instrument.

In admitting a tenant, the lord is merely an instrument; whether the admittance be on a voluntary grant, a surrender, or descent.

If a copyhold escheat to the lord, he may demise it by copy again; but the demise of it by copy again is entirely dependent upon his own inclination. He may keep it in his own hands as long as he pleases*; or he may, if he chooses to do so, absolutely change its nature and turn it into frank-fee. But though the *grant* of such land by copy is dependent upon his will, the *admittance* upon such grant is wholly regulated by the custom. By the grant the lord has signified his choice, and his option

* See *ante*, p. [97].

ceases, when the custom immediately attaches and imperiously prescribes the form. He becomes a mere instrument; he cannot vary the tenure or estate, the rents or services. If the custom warrant an estate *durante viduitate*, and the lord admit for life, it will not be obligatory on his successor: if he reserve ten shillings where the usual rent was twenty, it will not be good. And indeed the law is very strict in this point of reservation; for though the ancient accustomed rent be reserved according to the quantity, yet if the quality of the rent be altered, the heir may avoid this grant. For if the ancient rent from time to time had been twenty shillings in gold, and the lord [232] reserve it in silver, this variance of the quality of the rent is in force to destroy the grant: so if the ancient rent has been accustomedly paid at four feasts in the year, and the lord reserve it at two feasts*. So, if two copyholds escheat to the lord, the one of which has been usually demised for twenty shillings rent, the other for ten shillings rent, and he grant them both by one

* See *Cro. Car.* 16. *Cook v. Younger*.

copy for one rent of thirty shillings; this is not good: and so if a copyhold of three acres escheat; which has ever been granted for three shillings rent, and the lord grant one acre, and reserve *pro rata* one shilling rent, the true and ancient rent will not be reserved (1).

In admittance on a descent or surrender the lord is also a mere instrument. In the latter case, he has only a power or authority to admit according to the surrender. He cannot vary the estate limited by the surrenderor, or grant it to a person whom the surrenderor has not designated. If he admit otherwise, however such his act may bind himself, it will be by no means obligatory on others*. If a surrender be to the use of A. and the lord admit B. such admittance will be without warrant, and, therefore, void; and the lord may, notwithstanding such admittance, grant admittance again to A. If

(1) *Co. Copyh.* s. 41. 2 *Bl. Comm.* 370. ch. 22, and *ante*, ch. 3. Of Grants, p. [48].

* [As to admission under an erroneous or mistaken claim, see 7 *East*, 186. *Zouch v. Forse*; and *supr.* p. [24].]

he admit A. and B., A. shall take the whole; and the admission of B. shall have no operation. If the surrender had been to A. for life, and the lord admit him in fee, A. would only take for life agreeably to the surrender. If the surrender had been to A. absolutely, and the lord admit him on condition; or if the surrender had been on condition, and the lord admit him absolutely; the surrender shall control the admission (*m*).

On admittance on a descent, the person admitted is *in* by his ancestor (*n*), and on a surrender by the surrenderor (*o*); and not by the lord; and, therefore, he shall be paramount the lord's charges (*p*). And, in like manner, he who is admitted on a grant, is, on such admittance, *in* by the custom;

The surrenderor is *in* by the surrenderor.

(*m*) 4 Co. 28. b. Co. Copyh. s. 41. 3 Burr. 1543. *Baddley v. Leppingwell*. 4 Ibid. 1961. *Roe d. Noden v. Griffiths*.

(*n*) See 4 Co. 22. b. *Brown's case*.

(*o*) See *ante*, ch. 3. p. [106].

(*p*) Co. Copyh. s. 41. Tr. 91.

and therefore, not subject to any charges or incumbrances of the lord (q):

Relation.

[284]

And as the surrenderee is thus, on admission, in by the surrenderor, so such admissions shall relate to such surrender and operate as from its date. Hence the mesne acts of the former are avoided, and those of the latter confirmed. Hence the interests derivable out of the estate of the surrenderor are defeated, and attach to that of the surrenderee (r).

(q) 8 Co. 63. *Swayne's case*. *Watk. N.* lxxxvi. to *Gilb. Ten.* p. 430. and *ante*, ch. 2. Of Grants, p. [45].

(r) See further, *ante*, ch. 3. p. [103].

CHAP. VII.

OF FINES.

[285]

FINES payable to the lord by the copyholder may be divided into three classes; the first class being due on the change of the lord, the second on the change of the tenant, and the third for license to empower the tenant to do certain acts, as to demise, &c.

Fines divided into three classes.

When the fine is due on the change of the lord, such change must be by the act of God, and not in consequence of any act of the party. It can, therefore, be only claimed on the *death* of the lord. Should even a custom be alleged for its payment in cases in which the change was by reason of the lord's own act, such custom would not be supportable: as otherwise the lords might alien at pleasure, and so the tenants "be oppressed by multitude of fines (s)."

*When due on the change of the lord.
See 4 Bro. P. C. 201.
Lowther v. Raw.*

(s) *Co. Litt.* 59. b.

But where the fine is claimed only on death, any lord who has a right to admit, has a right also to such fine on the death of his predecessor; whether he be tenant for life only, or by the curtesy, or the like (*t*).

[286]

Due on the
change of
the tenant.

When the fine is due on the change of the tenant, it matters not whether that change be effected by the act of God or by the tenant's own act (*a*). Whenever the tenancy is changed there a fine is payable. Should the tenant be compelled to pay a fine by reason of any act of the lord, he would, as we have seen, be subject to much oppression; but where it is the consequence of his own act, he is left to his own discretion.

Defined.

A fine, therefore, of this second class, may be thus defined:—"A sum of money payable by custom to the lord, on the admission of every tenant, for each tenement to which he is so admitted."

(*t*) 1. *Strange*, 654. *Duke of Somerset v. France & al.*

(*u*) See *Co. Litt.* 59. *b.* *Kitch.* 132. *a.* 1 *Burr.* 206. *Earl of Bath v. Abney*.

Firstly then, it is “payable by custom :” Payable only by custom.

For where there is no custom there shall be no fine. Thus, in many manors it is not customary to pay any fine on the admittance of a person taking by descent (w).

Secondly, it is payable “on admission.” —on admission of a new tenant.
 “For the admittance is the cause of the fine.” Hence no fine can be due till the tenant be actually admitted (x); and, of consequence, the lord or steward cannot refuse admission till the fine be paid : nor is it in any ways necessary that the person praying to be admitted should *tender* the fine, though the fine on admission be certain ; notwithstanding it is otherwise laid down

[287]

(w) See 3 *Durnf. & East*, 162; *Doe d. Tarrant & al. v. Hellier & al.* *Kitch.* 103. b. and *Dougl.* 726. in *Not. & Freem.* 496. pl. 670.

(x) In some manors there are fines due for licence to *aliene* ; such fines, therefore, must necessarily *precede* admittance, if admittance be necessary. These are expressly excepted in the act of *Charles the Second* for abolishing the feudal incidents. But they are wholly different from those fines of copyholders which are spoken of in the text. They fall within the third class of our division of fines ; and will be noticed at the end of this chapter.

in some of the books (*y*). For it would be absurd to tender it *before* it became due; and it would not become due till the admittance of the tenant (*z*).

And, consequently, where there is no necessity for an admittance, no fine can be claimed.

Not payable by reversioner on re-entry for condition broken, or on determination of an estate for life, &c.

[288]

As where a person surrenders on condition, or for a less estate than he has himself in the premises, so that the reversion continues in him, and the condition be broken or fulfilled (as the case may be), or the particular estate determine, he shall be in *statu quo prius*; and so no new admittance can

(*y*) *Moore*, 623. *Ca.* 851. *Dalton & Hammond. Cro. Eliz.* 779. S. C. but note the same case is reported by *Coke* (4 *Rep.* 28. *a.*) who says it was adjudged otherwise.

(*z*) 4 *Co.* 28. *a.* *Hobart & Hammond*, which cites *Sande's* case, and *Bacon & Flatman*, as so adjudged. 1 *Roll. Abr.* 507. *Copyh. D. pl.* 2. 2 *Durnford & East*, 485. *The King v. the Lord of the Manor of Hendon*; and 1 *East*, 632. *Graham v. Sime.* 3 *Burr.* 1543. *p. Wilmot J. in Baddeley v. Leppingwell*; and see *Kitch.* 122. *a.* [And *supr.* p. [263].]

be requisite, and, consequently, no fine can be due (a).

But if the original copyholder convey the reversion to a stranger, such stranger cannot enter before his admission: For before his admission he is not tenant to the lord. Such reversion lies in tenure; and the reversioner cannot place another in the tenancy without the lord's consent: he can, therefore, only pass his reversion by surrender, on which an admission would be requisite; and, consequently, a fine would be due (b).

Att. of a grantee of such reversion.

It was said by *Lord Mansfield*, in the case of *Roe d. Noden v. Griffith*, according to *Sir James Burrow*, that if a copyholder in fee (to which estate he had been regularly admitted) surrender to the use of himself for life or in tail, with remainders over, and the

Surrenderor taking a new estate.

(a) 9 Co. 107. a. 1 Leon. 174. *Bulleyn & Grant*. Cro. Eliz. 148. S. C. *Kitch*. 123. a. *Calth*. 60. Co. Copyh. s. 56. Tr. 129. *Gilb. Ten.* 181. 194. 276. See also 2 *Just. Blackst. Rep.* 1046.

(b) See *Gilb. Ten.* 181. and *Watk. N.* lxxxiii. p. 429. and see *Fitzh. Abr. Recouv. en value.* 13.

ultimate limitation to himself and his heirs, he need not be admitted on such surrender; [289] for he was tenant already; and consequently would not be subject to a fine (*d*).

But this position is open to much observation.

In Mr. *Justice Blackstone's* report of the same case (*e*), the admission of the copyholder is said to have been *compelled**.

Besides, though the *ultimate* limitation was the *old* estate, it does not follow that the *prior* one was so. If a person seised of freehold lands devise to his heir for life, the heir shall be in by *purchase*; but if he devise to fifty strangers with the ultimate limitation to his own right heirs, they would be in by *descent*: in the first case the heir would take a *new estate*; an estate for life; not the estate in fee which was in the an-

(*d*) See 4 *Burr.* 1952.

(*e*) See 1 *Blackst. Rep.* 605.

* No means of compulsion except by custom. See *ante*, p. [237].

cestor; in the latter he would take the *old* estate: a portion of that very fee.

The particular estate, therefore, taken by the surrender, was *not* the estate which the tenant had before, as the reversion was. It was a *new* estate to *which* he had never been admitted. "The lord," indeed, "knew his tenant;" but an admission is not merely an acceptance of a person as a tenant, *but as a tenant of the particular lands.*

If a person had been regularly admitted to [290] *Black Acre*, and had sworn fealty to the lord, and purchased *White Acre* afterwards, he must have been admitted to *White Acre* also (*f*): yet "the lord knew his tenant:" he had accepted him as a tenant, generally; and had security for his fidelity. In some manors*, indeed, he would not pay *a fine*; but he certainly ought to be admitted equally as if he was to pay one.

(*f*) See *Co. Copyh.* s. 21. *Tr.* 16.

* See Appendix, No. IV. *Customs of Thornbury*, co. Gloc.

In *Burrow* it is said that the lord could not have compelled a new admission of the husband, even if the wife had died; and there could be no admission of the children unborn. But if the wife had died during the life of the husband, it could not have made *him* the more or the less a tenant. Had she died, there were *trustees* to take the estate: there was a vested remainder in them for preserving contingent ones.

Again, it is there said, "a person could not be admitted who was *tenant before*." This is true if we confine it to the *same estate*. He could not be admitted to the *same estate* to which he had been already admitted: he could not be placed in a tenancy which he already filled; or have that seisin given him which he already had. "At least," it goes on, "it was not requisite for *him*; though it might have been so for his *wife* and *children*." Till admittance, indeed, he would continue tenant; but this would be of his *old estate*, which he had *before the making of such surrender*, and not of the estate *to be taken under its limitations*. It must be upon *this ground*, therefore, that the doctrine is to be supported. The surrenderor

needs no admission ; for he is already tenant to the lord, as to the lands, with respect to his *old estate* ; which must continue till there be an admittance under the surrender. And the wife need not be admitted till the estate comes into possession by the husband's death. The surrender being for a *good* consideration, cannot be revoked by the husband, though there be *no* admittance ; and the lord is bound by the acceptance of the surrender, and compellable to admit according to its limitations. The admittance of the surrenderor, therefore, may not be essential, as he would continue tenant as to his old estate ; but it does not appear clear that the lord might not call him in by proclamation, and compel him (as it is said in Mr. Justice *Blackstone's* report of the case,) to be admitted under pain of forfeiture, to that estate *which he is to take under the surrender*. Where the lord is compellable to accept a surrender, he may, in his turn, compel an admission as a consequence *.

* But *quære* : as it seems settled that the lord has no means of compelling the admission of a surrenderee, except by special custom. See *ante*, p. [237].

He may, indeed, waive such admission; but the waiving of such admission is an acknowledgment of his right to insist on it if he chooses to do so.

[292] As to the fine, indeed, much may be urged. For though a fine cannot be due without an admission, an admission may be without a fine. However, as a *new estate* is limited, it should seem that a fine would be due; though I believe it is seldom taken *as to the estate of the surrenderor* in cases like these*.

Not due on a
release of
right,

If a person having a right to a copyhold, release to the tenant by wrong, no fine will be in consequence due (*g*); as the release of a copyholder can operate only by way of extinguishment (*h*); and the releasee having been already admitted, need not be admitted again.

* A special custom that none shall be taken. See Appendix, No. IV. *Customs of Thornbury, co. Gloc.* (*g*) *Co. Litt.* 59. *a. N.* (2.) 4 *Co.* 25. *b.* 6 *Vin. Copyh.* (2. *a.*) *pl.* 9. and see *Watk.* No. lxix. to *Gilb. Ten.*

(*h*) See *ante*, p. [6]. [279].

So if a copyholder be disseised, and afterwards enter on the disseisor, or recover by plaint in nature of an assize, he will need no new admission, and, therefore, shall pay no fine; for he will be in of his old seisin, and restored to his former tenancy (i).

In cases too in which the possession of the deceased is, as it were, continued, as in those of dower, &c. it seems no fine will be payable as no new admission will be necessary: but for this see *post.* p. [299].

or recovery
of seisin by
a disseisee;

—nor where
the same
estate is
continued.

[293]

Thirdly:—A fine is payable on the admission “*of a tenant*.” And here we may inquire who comes within that denomination at law. Now a *tenant* is he who *holds* of the lord (k); and, consequently, there can be no tenant where there is nothing *held*: and, therefore,

Tenant,
whom?

A person having an equitable interest only, as, *first*, A *cestui que use* or *trust* (for the statute of uses does not extend to copy-

Not payable
by *cestui que*
trust.

(i) *Co. Copyh. s. 56. Tr. 129.*

(k) *Co. Lit. 1. a. & b.*

holds (*l*),) cannot be a tenant; as an use lies not in tenure (*m*).

And, as the feoffee to uses was the tenant at common law (*n*), so here the person having the legal estate is tenant to the lord; and, consequently, where a copyhold is devised to *A.* in trust for *B.*, *A.* must be admitted; and on *his* admission a fine will be due*: and if the estate so devised be de-

(*l*) *Cro. Car.* 44. 2 *Ves.* 257.

(*m*) 2 *Bl. Comm.* 331. ch. 20. See *Co. Copyh.* s. 42. 2 *Ves.* 304. *Jenk. Cent.* 190. *Ca.* 92. *Hard.* 496.

(*n*) See *Jenk. Cent.* 190. *Ca.* 92. 2 *Ves.* 304. *N.* (1) to *Co. Litt.* 271. b.

* The trustee shall be allowed it out of the profits of the trust estate. See *Moore*, 890. *Rivet's case*. And in a case lain before me, wherein *A.* devised certain freehold and copyhold premises to three trustees and their heirs, in trust, to pay the profits over to *B.* for life, and then to convey and surrender the same to his children in fee: with executory devise in fee to *C.* and *D.* with executory devise to the heirs of testator:—Other property, real and personal, was devised to said trustees in trust, —and said trustees were executors:—residue to said *B.*, *C.*, and *D.* or such of them as should attain 21, in fee or absolutely. Trustees were admitted to the copyhold, and paid fine and fees, which they placed to

scendible, the heir or representative of *A.* must be admitted on his death; but on the death of *B.* no admission would be requisite (*o*).

[294]

Secondly.—If a copyholder *covenant* to *Covenant.* surrender to the use of *A.*: and *A.*, before a surrender be made, assign his interest to *B.* and *then* the surrender be made to the use of *B.* one fine only will be due on *B.*'s admission; as *A.* was never tenant to the lord (*p*).

the general account, and not to that of *B.* who was entitled to the profits of the copyhold for life. There was a clause in the will, authorizing trustees to reimburse themselves out of the trust monies thereby vested in them, or which should come to their hands by virtue of the will. I was of opinion that the trustees should reimburse themselves, as to the fine and fees, out of the profits of the copyhold to which they were admitted.

(*o*) See *Moore*, 890. *Ringt's case*. 1 *Ves.* 121. *Allen v. Poulton*. 1 *Burr.* 206. *Earl of Bath v. Abney*. 1 *Vernon*. 441. *Trinity College, Cambridge, v. Browne*. Custom to pay different fines. *Cro. Jac.* 671. [See further as to trusts, *supr.* [212]. [270].]

(*p*) 2 *Durnf. & East*, 484. *The King v. the Lord of the Manor of Hendon*. *Vide ante*, p. [103]. *N.* (*s*) and a provision made for this case in the *Customs of Yetminster prima*, co. Dorset, Appendix, No. II.

Equity of redemption.

Thirdly.—So a person having *an equity of redemption* may dispose of it by deed or devise without a surrender (*q*), and, consequently, no admission would be necessary, and consequently no fine would be due. On forfeiture or breach of the condition, the surrenderee would become the legal tenant; who must thereupon be admitted and pay his fine (*r*).

Authority.

Fourthly.—So a person having *an authority* only, and not any legal interest or estate in the premises, is not a tenant; and, therefore, needs no admission, and, consequently, shall pay no fine: as if “*I order and direct*” my executors *to sell* (*s*).

(*q*) 1 *Atk.* 388, 390. 2 *Atk.* 36. 3 *Atk.* 75. 1 *Bro. Chan. Cas.* 480. *Macnamara v. Jones, &c.*

(*r*) *Gilb. Ten.* 276. See 2 *Ves.* 302, &c. *Fawcett v. Lowther.* 2 *Vern.* 367. *Tredway v. Fotherley.*

(*s*) *Cro. Jac.* 199. *Beal & Shepherd.* *Godb.* 46. *Ca.* 57. 2 *Wils.* 400. *Holder d. Sulliard v. Preston.* Such an authority good against the lord by escheat. 2 *Co.* 53. a. But it seems that the lord may compel the heir of the testator to be admitted for the intermediate estate; as the fee will descend to the heir till sale, and consequently the lord be entitled to a fine on such heir's admission. (Note, this was suggested to me by

Commissioners of bankrupt have an authority given them by the statute, to convey the copyholds of the bankrupt by deed indented and enrolled; but the person to whom they are conveyed is, by the express provision of the act 13 *Eliz. c. 7. s. 3.* to pay or compound for the accustomed fines. If the commissioners, therefore, convey to

Assignment of bankrupt's estate.

[295]

As to the copyholds of collectors of taxes, see st. 43 Geo. 3. c. 99. sect. 52.

Mr. Butler.) If the sale does not actually take place till *after* the third proclamation, the lord may seize; but it should seem only *quousque*, (see *ante*, [234]. and v. 2. p. [97].) and if he can only seize *quousque*, the vendee may insist on admittance, and the lord must be contented with the intermediate possession, *as no fine can be due from the heir when the heir was never admitted*; and surely no heir would claim on such terms. See 1 *Wils.* 400-2. Lord C. J. Wilmot says, in *Holder Ex. dem. Sulyard v. Preston*, (2 *Wilson*, 200.) in a case of direction to sell, similar to the present, "that the lord has a right to call on the heir to be admitted, who has clearly the estate in him. If he does not come in the proper time, the lord may, by the special custom of some manors, seize the estate as forfeited; and by the general law of copyholds *quousque*, upon the principle of laches in the party interested." This was said, in a case laid before me, to have been copied from a MS. note of the case of *Holder d. Sulyard v. Preston*. C. W.

the assignees, such assignees* must be admitted and pay their fines, and convey the copyholds to their vendee by the usual mode of surrender. To avoid, therefore, the payment of double fines, it was recommended by *Lord Hardwicke*, in the case of *Drury and Mann*, to the commissioners, to except copyholds out of the deed of assignment, and convey immediately to the purchaser (t).

Bailiff of the manor as person of profits.

Fifthly.—Where, by the custom of the manor, the bailiff of the manor is to have the wardship of the copyhold-heir, being under the age of fourteen, such a guardian shall neither be admitted nor pay a fine;

* Having only an equity, the assignees may assign that equity to another who would then be entitled to admission. See *ante*, p. [102-3]. But qu. and see the case of *Drury & Mann*, where it is said by Lord Hardwicke, that no person can make a common law conveyance of a copyhold; it must be by surrender. The commissioners, by the 13 *Eliz.* c. 7. have no interest in the bankrupt's lands, but only a power to convey. 1 *Atk.* 96.

(t) 1 *Atk.* 95. But qu. whether this can be done. See the *stats.*

because he is but a pernor of the profits, and that not in his own right, but in the right of him to whom he is guardian (u).

Sixthly.—Where a person who has been wrongfully admitted, obtains a release of the *right*, no new admission can be requisite, as he was before equally tenant to the lord; and, therefore, no fine will be due in consequence of such accession to the right (v). [296]

Release of
the right.

Again :—Such fine is payable on the admission of “ *every* tenant.”—And here it will be proper to inquire, where, in case several persons be admitted, they shall be considered as one, or as several tenants to the lord.

Due on ad-
mission of
every tenant.

First, When the uses of a surrender are limited to one for life or years, with several remainders over, but one admission is requisite, and, consequently, but one fine will be due. The particular limitation and the

Particular es-
tate and re-
mainders.

(u) *Co. Copyh.* s. 56. *Tracts*, p. 128.

(v) See before, p. [292].

several remainders forming together but one estate, the admission of the particular tenant is the admission of those in remainder also (*x*).

Apportioning
fines.

If, on the admission of the particular tenant, the *whole* fine be actually paid, no portion can be due on the accession of the remainder-man (*y*). But it should seem, from the case of *Barnes v. Corke* (*z*), that a [297] fine may be taken by *special custom* on the accession of a remainder-man*.

(*x*) 1 *Mod.* 102. 120. *Blackburne & Graves*. 1 *Vent.* 260. S. C. 2 *Levinz*, 107. S. C. 4 *Co.* 23. a. *Gravener & Ted.* 3 *Lev.* 308. *Barnes & Corke*. *Moore*, 358. *Dell & Higden*; *ibid.* 465. *Tipping & Bunning*. *Cro. Jac.* 31. *Ancelme & Ancelme*. *Kitch.* 122. a. & c. [And the lord may assess the whole fine on the tenant for life refusing to admit him, unless he pay all that may be so assessed, not only upon the limitation to himself for life, but also on all those in remainder. 13 *Ves. Jun.* 253.]

(*y*) See 1 *Burr.* 212, & c.

(*z*) 3 *Lev.* 308. & *Gyppen v. Bunney*, *Cro. Eliz.* 504.

* [Custom that a remainder-man coming into possession on the death of tenant for life, must be admitted and pay a fine, held good: and if on the death of tenant for life, the next in remainder do not come in to

If, indeed, a part of the fine only, be imposed on the particular tenant, the residue may be assessed on the person in remainder (a). And the best and most equitable mode is, to assess the fine on the admission of the particular tenant, and to proportion it to the interests of the several claimants, who may pay their shares on acceding to the

be admitted and pay his fine, after proclamations made and presentment by the jury, the lord may seize *quousque* the tenant comes in, and maintain ejectment to recover the possession in the mean time. 5 East, 531. *Doe d. Whitbread v. Jenney*.] In this case it was said, that where by custom a fine is to be paid by the remainder-man, he is in such case bound to be admitted. But can there be a custom to have a fine *without* admittance? since admission is the *cause* of the fine. And if a custom be good that requires a fine from the remainder-man, the admission must be wholly independent on that custom, and consequently the necessity of *admission* can have nothing to do with the custom as to the fine, as the custom as to the fine cannot attach till *after* admission. If the admission be not made the fine cannot be due.

(a) 1 Vent. 260, &c. as before. [The lord may apportion the fine amongst the different parcels of the inheritance, but cannot remit it entirely to the tenant for life, and charge the whole upon the remainders. 13 Ves. Jun. 246.]

possession, when they are called in to swear fealty*.

Surrenderee
of a remain-
der-man must
pay a fine;
Fitzh. Abr.
Recouv. en
value 13.

But if a remainder-man surrender his interest to a stranger, such stranger on his admittance must pay his fine. For though the admission of the particular tenant was the admission of the original remainder-man, it was not of the purchaser (*b*): and a remainder is a tenement (*c*), as well as an estate in possession.

—so of an
heir of the re-
mainder-
man,

So if a remainder man die, the admission of the particular tenant would not extend to his heir; for the heir takes from the person in remainder and not immediately from the original surrenderor. He, therefore, is in of a different interest (*d*).

* [As to the quantity of fines on estates for life, or in remainder, *vid. infra*, p. [311]. [312]. An annuitant or person having a rent charge out of copyholds, shall not contribute to the fine. See 1 *Bro. Ch. Ca.* 444. N. *Maxwell v. Ashe.* 7 *Ves. Jun.* 184. S. C.]

(*b*) See *Cro. Jac.* 31. *Ancelme v. Ancelme.* 1 *Burr.* 213. *Watk. Gilb.* 417. N. lxxvii.

(*c*) *Bro. Ten. pl.* 107.

(*d*) And see 1 *Burr.* 213. If there be 500 persons to take successively in remainder for life, they would all be

A reversioner we have seen (*e*) may enter [298]
on the determination of the particular

admitted on the admittance of the particular tenant for life: for in truth the admittance can only extend to a life in existence, *i. e.* of the longest liver. This is analogous in this respect to a joint-tenancy, which can only last the life of the survivor. In the case of a joint-tenancy the several persons take together; in the former case the particular tenant and remainder-men take successively; yet they take only portions of *one and the same estate*. If the remainder be of a descendible estate, as to A. for life, with remainder to B. in tail, B. becomes tenant on A.'s admission, and he may be vouched or surrender. But if B. die, living A. the heir of the body of B. must be admitted to his remainder in tail, as he comes in by descent.

If there be tenant for life, with remainder to the unborn son, or the heir of B.; the limitation to the son or heir of B. is contingent: but so soon as B. has a son born or dies, the use will arise, and be executed or vested, (supposing A.'s estate to be in existence,) and so fall within the law as to a vested remainder. In short, coparceners make but one heir,—joint-tenants compose in fact but one tenant,—a particular tenant and the remainder-men take but one estate,—and tenants in common take several; and, therefore, in the three former cases one fine only can be due on admittance, and in the latter the fine must be apportioned, *i. e.* there must be *several* fines, but those fines, when added together, must amount only to the original fine.

(*c*) *Ante*, p. [287-8].

or reversioner.

estate, without a new admittance or fine; for he would be in of his old seisin: but if such reversioner die, during the continuance of the particular estate, his heir must be admitted and pay his fine; for a reversion is a tenement (*f*): and the heir here takes it by descent.

Joint-tenants.

(Death.)

Secondly, Where a surrender is made to the use of two or more *jointly*, they are all but *one tenant* to the lord; and, therefore, but *one fine* is due on their admission. And on the death of one of them, the survivors take his share and continue in on the original admission (*g*).

Coparceners.

So as several coparceners make but one tenant, *one fine* only would be due on their admittance (*h*).

If they are admitted severally, the fine must be apportioned: as if three coparce-

(*f*) *Dyer*, 137. pl. 26.

(*g*) See *Kitch.* 122. a. *Co. Copyh.* s. 56. 2 *Wils.* 162. *Roe d. Ashton v. Hutton & al.* And *ante*, ch. 6. p. [272]. And in the case of *Fisher v. Wigg.*

(*h*) See *ante*, p. [277].

ners be admitted severally, each must pay a third of the whole fine.

But when one coparcener dies, the others (Death.) (or the heirs of the deceased) must be admitted to the share of the one so dying, and [299] pay their fine (i).

So tenants in common must be severally admitted and shall pay several fines; they having several estates: here not only being a plurality of persons but of tenants also, as the terms imply (k). Tenants in common.

Thirdly, Where the interest of the person claiming is only a continuance of the estate of the deceased. And first with respect to free-bench. Continuance of the same estate.

There are indeed books, in which it is Freebench. laid down, that the widow must be admitted

(i) *Co. Copyh.* s. 56. p. 130. *Calth.* 64. *Gilb. Ten. Watk.* N. clxxiv. p. 478. *Co. Lit.* 185. a. & n. (9).

(k) 1 *Pr. Wms.* 21. 1 *Lord. Raym.* 631. *Fisher & Wigg.* *P. Holt*, and *ante*, p. [280].

to her freebench and pay her fine (*l*); yet, according to others, (which seems the better opinion,) she shall be in of the estate of her husband without admission, and, consequently, without fine: the estate in freebench being considered as an excrescence growing of itself out of that of the husband, and being as it were a continuance of it (*m*).

[300]

(*l*) *Co. Copyh.* s. 56. *Tr.* p. 128. *Kitch.* 123. a. *Gilb. Ten.* 223-4.

(*m*) *Hob.* 181. *Howard v. Bartlet.* 1 *Lev.* 20. *Chantrell v. Randall.* *Ibid.* 172. *Newton v. Shafte.* *Hutton*, 18. *Jurden & Stone.* See 5 *Burr.* 2787. *Vaughan v. Atkins.* *Watk. on Gilb. Ten.* p. 440. N. xcvi. "That that lease of the wife, where such a custom is good before admittance, especially as our case is. 1. Because she had prayed to be admitted, and no default is assigned to be in the wife. 2. Because in that case no fine is due to the lord, and so no prejudice to the lord. For in that case it was said by the court, there needs no admittance: for by *Hubbard*, that estate *durante viduitate* is but a branch of the estate of the husband, and the admission of the husband suffices for the estate of the wife; and the estate of the husband was big with the estate of the wife, which was to be brought forth by the death of the husband. And that case is more strange, which is the case of an heir of copyholder, which ought to pay a fine for admittance, and yet before admittance he may bring an action of trespass." *Rennington v. Cole.* *Noy*, 29.

Secondly, And so with respect to cur- Courtesy.
tesy: for the husband shall have his curtesy
without being admitted after the death of
his wife (n).

Thirdly, So if a person intermarry with a Seisin in right
of marriage.
feme copyholder in fee or for years, he will
become entitled in her right, and shall not
be admitted, and, therefore, shall not be
subject to fine; nor, in the latter case, if he
survive her (o).

And with respect to the three instances
immediately preceding, we may remark that
marriage, being originally with the consent
of the lord, amounted to an admission of the
husband as tenant. The husband, on mar-
riage, became possessed in the right of the
wife; and on marriage a fine was generally

(n) See the books cited in (m) and *Moore*, 597. *Bullock v. Dibley*. 1 *Leon.* 4. ca. 8. 4 *Leon.* 117. ca. 236. *Wash. on Desc.* 53-4. not.

(o) *Dyer*, 251. a. *Hauchet's case*. 3 *Leon.* 9. *De-
dicot's case*. *Calth.* 89. 95. *Co. Copyh.* s. 56. p. 129.
Gilb. Ten. 333. See *Customs of Yetminster prima*,
Appendix, No. II. Husband shall pay a penny to the
steward.

[301] paid. A fine, therefore, having been already given, and the husband by marriage having become already fixed in the tenancy, it seems to follow that no subsequent admission could be requisite (*p*).

Executors
must pay a
fine.

It was once held, that the executors continued the estate of their testator, and so needed no admission; but it is now settled that they must be regularly admitted and pay their fines (*q*).

But this must necessarily be understood of such estates or terms by reason of which the testator himself or original termor would have been subject to admission. For had a copyholder *leased* for years by *license*, the lessee would not require any admittance, as he would not become tenant to the lord; and, by consequence, his executors would need none. The term created by *demise* on license, would not be a *copyhold*, but a com-

(*p*) *Watk. N.* cxxxvi. to *Gillb. Ten.* 460. and *entr.* p. [272-3].

(*q*) 1 *Burr.* 206. *Earl of Bath v. Abney.*

non-law, interest (*r*). Such interest might be assigned by the lessee without any further license or consent of the lord(*s*): it is extendible at law(*t*); it may even continue after the determination of the copyhold(*u*).

The *copyholder* is tenant to the lord*: on [302] his death his heir must be admitted and pay his fine. But the lord cannot notice the change of the lessee: he has a tenant independently of him. But if a term of years be limited on a *surrender*, or created by *devise* (as in the case of the Earl of *Bath v. Abney* (*w*), in *Hauckett's* case (*x*), &c.) it would then *be held of the lord by copy*; the termor would be a *tenant* to the lord; and, therefore, must be admitted and pay his fine.

(*r*) See *Co. Copyh.* s. 51. *Tr.* 119, 120. 3 *Leon.* 69, 70. *Ca.* 196.

(*s*) 1 *Roll. Rep.* 508. pl. 14. *Johnson v. Smart*, and 1 *Roll. Abr.* 508. *Copyh.* (D) pl. 14. S. C.

(*t*) See *Watk. N.* clxvii. viii. ix. *Gilb. Ten.* 467.

(*u*) *Hutt.* 101-2. *Turnor v. Hodges.* and *Watk. N.* cliii. *Gilb. Ten.* 469.

* See *Hob.* 177. *Swinnerton v. Miller.*

(*w*) *Burr.* 202.

(*x*) *Dyer*, 251. a. and *ante*, p. [300].

Heir at law. In most manors a fine is due on the admission of an heir: and though the heir may surrender before admission, he shall not defeat the lord of his fine. The lord is not obliged to receive his surrender till the fine be paid (y).

Occupant. *Sir Edward Coke* tells us, that if a copyhold be granted *durante vitá*, and the grantee die, living *cestuy que vie*, and a stranger enter as a *general occupant*, he shall be admitted and pay a fine (z).

But the better opinion appears to be that there can be no *general* occupant of a copyhold(a); though there may be a *special*

(y) *Watk. No. cxxxvi. to Gilb. Ten. 406. See also Fearne's Posthum. Works, 103, &c.*

(z) *Co. Copyh. s. 56. p. 128.*

(a) 2 *Lord Raym. 1000. Gilb. Ten. 326. 1 Roll. Abr. 511. L. pl. 3.* [There shall be no occupant of a copyhold, but it goes to the lord. *Noy. 4.* In *Zouch v. Forss*, (7 *East*, 186.) it was also held, that there can be no general occupancy of a copyhold, because the freehold is always in the lord: and that the statutes 29 *Car. 2. c. 3. s. 12.* and 14 *Geo. 2. c. 20. s. 9.* appropriating estates *pur autre vie*, where there is no special occupant, do not extend to copyholds.]

one (b); as if it be granted to *A. and his heirs* during the life of *B.* In which latter case, if *A.* die during the life of *B.* the heir of *A.* must certainly be admitted and pay his fine (c). [303]

Again: A fine is due “for each tenement to which he is admitted.” As where a copyholder has several lands, severally held by several services, by copy, the lord ought to assess and demand the fines severally, for every parcel which is so severally held (d). Several tenements must pay several fines.

But if the particular tenant, and him in

(b) 2 *Just. Blackst. Rep.* 1148. *Doe d. Lempriere v. Martin.* *Co. Copyh.* s. 56.

(c) See *Co. Copyh.* s. 56. *Tr.* p. 128. *Gilb. Ten.* 327. [As to the quantity of such fine, *vid. infra*, p. [313].] To *A. and his assigns.* Suppose *A.* to die (living *cestuy que vie*,) without actually assigning; —would not *A.*’s executors or administrators take as assignees in law? See 5 *Co.* 17. b.

(d) 4 *Co.* 27. a. *Taverner & Cromwell.* *Ibid.* 28. a. *Hobart & Hammond.* *Co. Copyh.* s. 56. *Dougl.* 722. *Grant & Astle*, and the case of *Searle & Marsh*, in *Fisher on Copyh.* Appendix, 280. 282. See also *Cro. Eliz.* 779. *Dalton & Hammond.*

Surrender by a particular tenant and remaindermen, &c. remainder or reversion, join in a surrender, the person to whose use the surrender is so made, shall pay but one fine on his admittance; for but one estate is conveyed (e).

By coparceners.

So, if several coparceners join in a surrender, but one fine will be due on the admittance of the surrenderee (f).

[304]

By joint-tenants,

And so of a surrender by several joint-tenants (g).

By tenants in common.

And it is said to be the same as to tenants in common (h).

But *quære* whether, if two tenants in common join in a surrender, it shall not operate as *several* grants; (they having several freeholds at common law;) and so several fines be due: notwithstanding the doctrine be delivered otherwise by *Sir Edward Coke*, &c.

(e) *Co. Copyh.* s. 56. p. 130. *Kitch.* 123. a.

(f) *Kitch.* 123. a.

(g) *Ibid.* & *Co. Copyh.* s. 56. p. 130.

(h) *Kitch.* & *Co. ubi supra.*

For as tenants in common must be severally admitted, they must, of consequence, have several tenements: and, although several tenements be surrendered by one surrender, the person admitted to them must pay several fines (i). And this case differs, I conceive, essentially from the surrender of a particular tenant and a reversioner, or of several joint tenants or coparceners; for in those instances, but *one* estate is conveyed*.

If a copyholder suffer a recovery by plaintiff in nature of a writ of entry in the *post* for his better assurance, and to defeat an estate-

Fine on a recovery being suffered.

(i) See the books referred to in (d) last page.

* [Devisees of a copyhold holding as *tenants in common*, have *several* estates, to which they must be *severally admitted*, and for which *several services* are due to the lord, and a *several heriot* on the death of each tenant. And the services, heriots, and fees on admission thus multiplied, shall continue due and payable notwithstanding the *re-union* of the same land afterwards in one person; the estates or interests in the land, once divided in severalty, continuing always after several. 6 *East*, 476. *Attree v. Scutt*, and *vid. sup.* p. [280].]

[305] tail, those who recover have seisin by precept of *habere facias seisinam*, and they are in the *post*, and by the recovery ; and, therefore, but one fine shall be paid to the lord ; for the recovery was only for further assurance, and the surrenderee and all make but one tenant by copy, and so there is due but one fine (*k*).

Having thus seen *when* a fine is due, we will proceed to inquire, *first*, as to the quantity of such fine: *secondly*, as to its *assentment, payment, and refusal*; and *thirdly*, as to the *recovery* of such fine when due.

(*k*) *Kitch.* 122. *b.* *Co. Copyh.* s. 56. *Tr.* 130. If the plaint, in nature of a *præcipe*, be brought immediately against the copyholder who has been admitted, (as, for instance, the tenant for life,) it should seem that no fine would be due on a recovery, as the tenant to the plaint and the vouchee (the remainder-man in tail) were already admitted, and the recoveror would be in the *post*; *i. e.* in judgment of law, in of his *old* estate. But if the tenant for life surrender to a stranger to make him tenant to the plaint, and he be (as he must be) admitted, a fine would be due on such stranger's admission. So if the recoveror surrender to the purchaser, such purchaser must be admitted and pay his fine.

And, *first*, as to the *quantity* of such fine. Quantity of fine.

A fine is either certain or arbitrary.

A fine certain is when the *quantum* is Fine certain.
fixed or definite, so that it cannot be exceeded by the lord.

But it is not necessary that it be absolutely certain; if it be only relatively so it is enough: for so that it be independent on the will of the lord, and reducible to a certainty by reference to something else, it is sufficient: as to pay so much as the lands are worth by the year at the time of admittance; for here the value of the lands may be ascertained; being triable by a jury (*l*).

Whether a fine be certain or not must be decided by the rolls of the manor (*m*). To prevent, therefore, their being considered as

[306]

How proved whether certain or uncertain.

(*l*) 2 *Show. Rep.* 507. *Perkins v. Titus. Carth.* 12. S. C. 3 *Lev.* 255. S. C. 1 *Freem.* 494. S. C. The law will presume that a fine is uncertain until the contrary be shewn. *Per Montague, C. B.* 2 *Mod.* 231. *Trotter v. Blake.*

(*m*) See 2 *Bulst.* 32. *Allen v. Abraham. Toth.* 167.

certain, it is usual and prudent to vary them. But if it can be shewn, by a series of ancient rolls, that they were in remote times uncertain, the entry of them as certain, in subsequent rolls, though for the period of two or three hundred years, will not make them certain. But the entry of a *few* payments will not be permitted to operate either way; but will be deemed to have crept in through the inattention or negligence of the steward. Thus it was held in Chancery, in *Lord Gerard's* case, that where by ancient rolls it appeared that the fines of the copyholds had been uncertain from the time of *Henry* the third to the 19th of *Henry* the sixth, and from thence had been certain, except twenty or thirty, that those few ancient rolls did destroy the custom for certainty of fines: but that, if from the 19th *Henry* the sixth, all were certain except a few, and *no*(*n*) uncertain rolls before, those few should be intended to have escaped; and so not destroy the custom for certain fines(*o*).

(*n*) In *Godh.* it is "*so*," which destroys the sense of the passage: it evidently is misprinted for "*no*."

(*o*) *Godh.* 265.

An uncertain fine is where the *quantum* is dependent upon the will of the person imposing or assessing it. And it belongs, of common right, to the lord or his steward to assess it; but there may be a custom for the homage to do so (p). Uncertain fine. [307]

But, though the fine be regarded as arbitrary, it must nevertheless be, in most cases, a reasonable one. Should the lord be permitted to assess an unlimited fine, it would open a door to much oppression. He might use such a power for the purpose of disinheriting the heir. The law, therefore, has, in many cases, restricted him in his demands, Must be reasonable.

In some manors, as before observed, if the lord should be so exorbitant in his demand that the tenant cannot accede to it, he may have the fine assessed by the homage (q): but if no such custom exist, the Fixed by the homage.

(p) See 1 *Roll. Rep.* 48. *Crabb & Bevis*, (cited.) *Noy*, 3. S. C. and see *Noy*, 2. 1 *Freem.* 494. ca. 669. *Cro. Jac.* 368. *Ford v. Hoskins*.

(q) See before (p) *Crabb & Bevis*.

Reasonableness to be determined on action brought.

tenant may justify a refusal to pay it in many cases; and the reasonableness of it shall be determined on action brought (r).

[308]

When restricted to two years value;

In cases where the lord is compellable to admit, and the heirs of the person so to be admitted would also be subject to fines on acceding to the estate, the fine must not exceed *two* years improved value of the lands, without deducting land-tax, &c. except quit-rents (s).

when not.

But where a *purchaser* only is finable, and not a person taking by descent, the lord shall not be restricted to two years, but

(r) 13 Co. 1. *Willowe's case*. Moore, 623. *Dalton v. Hammond*. 3 P. Wms. 157. *Cowper v. Clarke*. And see the case of *Grant & Astle*, in *Dougl.* But note, the lord is not obliged to prove its being reasonable, the copyholder must show it to be otherwise. *Hob.* 135. *Denny & Leman*.

(s) *Dougl.* 722, &c. *Grant & Astle*, and see 2 *Strange*, 1042. *Halton. bart. v. Hassell*. And this doctrine seems equally applicable to a copyhold for life, with power to nominate a successor. (See *ante*, [43-4]. n. (h).) As a copyholder in fee pays in fact for a *life estate*. See *post*. [311].

may, if no custom be to the contrary, take four, five, or even seven years value (*t*).

In some manors a person only fines upon his *first* purchase; as if he purchase an acre of land, he shall pay a fine on his admission to it; but if he purchase fifty acres afterwards, he shall pay no further fine (*u*). In such cases also the lord is not restrained to two or to seven years value (*u*).

So in cases where the lord is not compellable to admit, but the admittance remains merely voluntary, as on grants of escheated lands and the like; or where they are grantable only for life, *without a right of renewal*, the lord is under no restriction what-

[309]

(*t*) 1 *Freem.* 496. *Pinsent's* case, cited.

(*u*) Manors of Lambeth and Richmond, in Surry, also Harrow on the Hill, &c. *Kitch.* 103. b. And noticed by *Nottingham, C.* in *Morgan & Scudamore*. See 1 *Freem.* 496. in *King v. Dillington*, and 1 *Show.* 86. *Quere*, if testator devise copyholds to A. B. & C. D. and their heirs, in trust, and A. B. and C. D. be tenants already,—shall they pay a fine? If not, the testator may cheat the lord by making those persons trustees who had been before admitted. C. W.

ever(w). In these cases he is under no obligation to grant at all: if he chooses to do so, he may fix his own terms; if the person wishing to become tenant does not care to accede to them, he is not necessitated to do so: no one is injured. These cases are not like those where the person soliciting admission has a legal right to succeed. Should the lord in those instances be left to impose his own terms, the person soliciting might be deprived of his inheritance or prevented from exerting that power of alienation which the law has now invested him with. Here those reasons fail. The lord has a right to make the best bargain he can.

The rule, therefore, that the lord shall be confined to two years value of the tenements, is only applicable to certain cases; and seems to have been too hastily extended in some recent instances.

But before we dismiss the subject, we

(w) 13 Co. 3. See *Hetley*, p. 6. and *Fish. Copyh.* 90. and see the case of *Wharton v. King*, *Anstruther's Rep. in Excheq.* 659.

may advert to two cases which peculiarly demand our attention, which are those of *Morgan & Scudamore*, and *Wharton & King*.

The case of *Morgan & Scudamore* (x) is ^{*Morgan & Scudamore.*} cited by *Lord Loughborough* in that of *Grant & Astle* (y), and relied upon by his lordship as fixing the fine to two years value. [310] In *Morgan & Scudamore*, indeed, *Lord Nottingham* ordered such fine to be given, but it was under the peculiar circumstances of the case. The copyhold in that case, was granted *sibi & suis* (z), for ninety nine years; but there was *a custom alleged to compel the lord to renew*; and although no fine was payable during the ninety-nine years, yet the lands were subject to heriot, &c. But from the honourable Mr. *Legge's* manuscript copy of *Lord Nottingham's* reports, which the author of these pages has been permitted to consult through the favour of Mr. *Hargrave*, it appears that his lordship considered *one year*

(x) 2 *Chan. Rep.* 134. See *Finch.* 464. S. C.

(y) *Dougl.* 727. *in not.*

(z) 2 *Chanc. Rep.* 134.

and a half's fine to have been the reasonable fine in common cases, referring to *Dow & al. v. Golding*, in *Cro. Car.* 196. on which he relied, and therefore gave half a year's value *more* in this instance by reason of the fine being payable only once in ninety-nine years: so that this case, instead of being an authority for a restriction of the fine to two years value, is a proof of the contrary.

[311] But it should seem that a fine would now be considered as due in the case of death within the term, whether the grant was *sibi & suis* or whether the person taking, took merely as executor (a): and, consequently, on the renewal of the term, the reason for augmenting the fine in this respect would not now hold.

The other case of *Wharton v. King* is now reported by *Anstruther* (b); and it will,

(a) See 1 *Burr.* 206. *Earl of Bath v. Abney*. But see 2 *Chanc. Rep.* 135. where it is stated, "that the tenants of the manor do not, during the 99 years, pay any fine, either on death or alienation, so that nothing is due to the lord for 99 years together."

(b) *Rep. in Exch.* 659. and see the cases of the *Duke*

therefore, be necessary only to observe that it was determined in that case, that in order to support a custom of renewal of copyholds for lives, the plaintiff must allege such custom to be on payment of a fine *certain*: to allege it to be on payment of a *reasonable fine* will not be sufficient*. If such custom be not found to renew on payment of a fine *certain*, the lord may insist upon his own terms.

When a person is admitted to an estate in remainder, the fine is usually one half.

Fine on remainder.

A tenant for life is to pay a whole fine, equally as if he were tenant in fee, in cases where the heirs are finable†. For in such

Tenant for life must pay a whole fine.

of *Grafton v. Horton*, before the Lords, 3 *Bro. Parl. Cas.* 269. and *Lord Abergavenny v. Thomas*, in 1 *Abr. Cas. Eq.* 120. in the margin, and both cited in *Whar-ton v. King*.

* But see *Noy*, 2. and *ibid.* 3. *Crabb v. Bales*, *contra.* and *Crabb & Bales or Bevis*, cited. 1 *Roll. Rep.* 48. and *Morgan v. Scudamore*, *ante.* See also *Cro. Jac.* 368. & 4 *Leon.* 238. *Ball's case*.

† QY. whether, if tenant for life (where there are remainders over) pay the *whole* fine, it will not be a lien

cases, the admission of the tenant in fee is only the admission of an individual; and, when he dies, his heir must be admitted again. The fine, therefore, becomes payable on the admission of a new tenant; and [312] if he is to take the immediate possession, and enjoy it for life, the whole fine will be due. A tenant for life, therefore, shall pay the same fine as a tenant in fee simple whose heir is to fine on succeeding him: if indeed the heir of the tenant in fee is not to fine on taking the possession, the reason will not hold; and a less fine must be imposed upon the tenant for life.

Fine on
estate for se-
veral lives.

Where there are many lives, the rule, generally, is to take for the second life half what the immediate tenant for life pays, and for the third half what the second pays. So that when there are two admitted, the fine

on the lands? See, as to fine on renewal of leases, 2 Bro. C. C. 659. *Adderley v. Clavering*, and *ibid.* 243. *Stone v. Theed & al.* Note, this was suggested by Mr. Butler. See also 1 Bro. C. C. 440. *Nightingale v. Lawson*. Annuitants not to contribute. 1 Bro. C. C. 444. *N. Maxwell v. Aske*, and 7 Ves. Jun. 184. S. C.

is as much as for one life and half as much more: when there are three, as much and half as much as a fine for two lives. Or as Sir *James Burrow* expresses it, the fine for two lives is the *sesqui* of that taken for one; and the fine for three is the *sesqui* of that taken for two (c).

But this must be understood of persons *Successive*. taking *successive**, or one after another; for if they take as joint-tenants, or as tenants in common, it would be different. In the former case the admission of one would be the admission of all; and but one fine would be due: in the latter, they must be severally admitted, and the single fine be apportioned; i. e. each shall pay a several fine; but so that, [313] when their fines be added together, they shall make the original fine for the whole. Thus if the custom be to pay two years value on admission, and two tenants in common be admitted, each shall pay two

(c) 1 *Burr.* 217. in marg. The rule above noticed is known to the author of these pages to be observed in many manors in various parts of the kingdom.

* See *Co. Copyh.* sect. 56. *Tracts*, 130.

years value of his moiety: and two such fines will be the same as the single fine for the entire tenement.

Occupant. If a copyhold be granted to A. and his heirs during the life of B., and A. die living B., the heir of A. shall, on his admission, pay such fine as, according to the custom of the manor, a *purchaser* ought to pay. For he does not take *by descent* but *as special occupant* (d).

His taking, therefore, as special occupant and not as heir, is, as to most manors, of importance in this respect. In many manors, as before noticed, a person taking *as heir* shall pay *no* fine. In some he is to pay a *greater* fine than a person taking by *purchase*; and in others a *less*.

The fine of the special occupant should be proportioned to the probable duration of the life of the *cestui que vie*: for as he is compellable to be admitted under pain of

(d) See *Gilb. Ten.* 327. and see also 10 Co. 58. a. and 2 Bl. Comm. 259, 60. ch. 16.

forfeiture, so the lord, on the other hand, is compellable to grant him that admittance: [314]
 And if an unreasonable fine be imposed, the courts would equally interfere and aid him as on a strict descent (*e*).

Secondly; As to the assessment, payment, Assessment, &c.
 and refusal of the fine.

We have already observed that it belongs of right to the lord or the steward to assess the fine, but that by custom the homage may do so (*f*).

But an assessment by some person or other is requisite (*g*): though the assess-

(*e*) *Watk.* No. clxxi. to *Gilb. Ten.* 476.

(*f*) *Ante*, p. [307].

(*g*) *Dougl.* 727. 731. in not. In an action the lord can only recover the fine *assessed*. As if he assess a fine of 100*l.* and remit 40*l.* and on action the jury find the annual value of the premises to be 30*l.* and give their verdict in favour of the lord for 60*l.* he shall not recover, as the fine assessed was 100*l.* See 3 *Bosang. & Puller*, 946. *Lord Northwick v. Stanway*. [But the lord may re-assess such fine at two years value, as

ment by the lord or steward may be made out of the manor (*h*).

As the fine does not become due till the tenant is actually admitted, it cannot, of consequence, be assessed or imposed till then, in cases where the lord is compellable to admit. If the lord, indeed, be not compellable to admit, the fine must of course be agreed upon in the previous treaty. In those cases the lord must make the best bargain he can; and the tenant must use his discretion.

Tenant may refuse to pay an unreasonable fine.

[315]

Where the tenant may compel the lord to admit him, and the fine is not certain, if the lord or his steward impose a fine which he conceives to be exorbitant, and there be no custom in the manor for the homage to settle and fix it, he may justify a refusal to pay

found by the homage, and after demand recover the same, although there be no entry of such re-assessment on the court rolls. 6 *East*, 56. *Lord Northwick v. Stanway*.]

(*h*) 1 *Lord Raym.* 44. *Yaxley v. Rainer*. The assessment need not appear upon the rolls. 6 *East*, 56. *Lord Northwick v. Stanway*.

such fine (i). If, indeed, it shall appear on the matter being brought into court that the fine so assessed was manifestly reasonable, and that the tenant had objected to it without good cause, the law would not allow him to shelter himself under any alleged doubts; but would declare it a forfeiture of the tenement on which the fine was assessed (k). However, the courts are not rigid in this respect; but allow much latitude to the tenant's discretion. If no sinister intention be apparent on the part of the tenant, the law will not permit a forfeiture to incur by reason of his refusal, though the fine prove eventually not to have been excessive (l).

A bill will not lie in equity for an individual copyholder to be relieved against an excessive fine. The reasonableness of it must be determined at law. Though a bill may

Bill in equity
will not lie
for relief in
case of an ex-
cessive fine.

(i) 4 Co. 27. b. *Hobart & Hammond. Cro. Eliz.* 779. *Dalton v. Hammond.*

(k) Co. Litt. 60. a. N. (1). *Parker's case* cited.

(l) 1 Rol. 7. pl. 5. 3 Lev. 308. *Barnes & Corke.*

be brought to settle a *general* fine payable by all the copyholders of a manor, and this to avoid a multiplicity of suits (*m*)

[316]

Several fines
must be sever-
ally assessed.

Whether the fine be certain or uncertain, care must be taken that in case there be several tenements held by the same person, the fines be assessed and demanded for the tenements severally. For if a person be admitted to several tenements, one fine cannot be assessed for the whole. If there are three acres severally held, there must be three several fines. And if those three acres, so held, be surrendered to the use of A., A. on his admission, must pay three fines as the surrenderor had done before. So, if several copyholds escheat to the lord, and he regrant them to be held by the ancient services, they shall be severally held as they were before the escheat; and consequently there must be several fines (*n*).

Fine to be set
according to
the improved
value.

Again, the fine must be set according to

(*m*) 3 *P. Wms.* 155. *Cowper v. Clerk.*

(*n*) 4 *Co.* 27. *a. Taverner & Cromwell. Ibid.*
28. *a. Hobart & Hammond. Dougl.* 722. *Grant & Astle.*

the improved annual value at the time of the assessment, and not according to the annual rent: for the annual rent may in many cases be comparatively trifling; as where the lands have been let on lease many years before by license of the lord (*o*). And in assessing the fine according to the annual value, no deductions are to be made except as to quit-rents (*p*).

[317]

Where the fine is certain, the tenant ought to be ready to pay it on demand immediately upon his admittance*: but where it is uncertain, a day and place should be appointed him by the lord or steward to pay it in: and if no such appointment be made he shall be allowed a reasonable time for paying it by the law; for he is not obliged to pay it on demand; for, as it was impossible for him to know what the lord would assess, he could not come prepared for its payment (*q*).

When to be paid.

(*o*) 2 *Strange*, 1042. *Halton, bart. v. Hassell*.

(*p*) See *Dougl.* 727. *Grant & Astle, in not.*

* Custom for the lord to seize, &c. till the fine be paid,—good. *Cro. Eliz.* 351.

(*q*) 4 *Co.* 27. b. 28. a. *Hobart & Hammond*. But

Tender.

If the lord assess an uncertain fine when in truth the fine should be certain, the tenant, to prevent forfeiture, should *tender* what he conceives the certain fine (*r*).

Where to be paid.

[318] In order to incur a forfeiture for non-payment, the place appointed* for payment of the fine should be within the manor, and so appear. But in an action of debt for the fine it is not essential that the place be expressly alleged to be within the manor, for it shall not be presumed to be out of the manor: and, indeed, it is said that the lord may appoint a place for payment out of the manor, and recover in debt; though such appointment would not be good in case of forfeiture (*s*). But this doctrine appears questionable. For if an appointment out of the manor would be good in one case, it should seem that it would be so in the other; since the difference would be in the

this reason does not seem to apply in cases where the lord is restricted to two years value, for then the tenant might have come prepared.

(*r*) *Cro. Jac.* 617. *Gardiner & Norman*.

* Some place should be appointed. 13 *Co.* 2.

(*s*) 1 *Lord Raym.* 44. *Yaxley v. Rainer*.

event, and not in the thing itself. The argument too urged by Serjeant *Rotherham*, in the case of *Yaxley v. Rainer*, has much weight; "that if such appointment be good, the tenant might be forced to go all over *England* in quest of the lord, to the tenant's great prejudice." And it does not appear that the lord can, in any case, oblige the tenant to go out of the manor, except it be to a court within the same honour, by custom, as before noticed (*t*).

When the fine is regularly assessed, (for a regular *assessment* is absolutely essential (*u*), there must be a demand of such fine, and that of the *person* of the tenant (*w*), by the lord or his steward (*x*), of the specific sum assessed: for if he demand a larger sum than is due, he must make a new demand before he can recover at law; for he shall not, on

Demand must be of the person of the tenant.

How to be made.

[319]

(*t*) *Ante*, p. [253].

(*u*) *Dougl.* 727. 731. *in not.* and *ante*, [314]. n. (*g*).

(*w*) *Hob.* 135. *Denny & Lemman.* 2 *Mod.* 229. *Trotter v. Blake, in Scacc.*

(*x*) 2 *Mod.* 229. *Trotter v. Blake, in Scacc.* And the steward may demand it without an express authority in writing. *Trotter v. Blake.*

such former demand, recover what is actually due, but judgment shall be given against him (y).

As to infants
and femes covert.

The statute 9 *Geo. c.* 29. relative to copyholders who are covert or under age, and entitled by descent or surrender to the use of a last will, ordains that the fines imposed on their admission shall and may be demanded by the bailiff or agent of the lord, by a note in writing signed by the lord or his steward, and left with such infant or feme covert, the guardian or husband, or with the tenant or occupier of the premises; but that no forfeiture of the copyhold tenements of such infant or feme covert shall be incurred by reason of the non-payment of their fines.

Recovery of
fines.

Thirdly, as to the *recovery* of fines.

Seizure on
non-admittance.

As no fine is due till admittance, the admittance of the tenant is compulsory (z).

247

(y) See *Skin.* 249. *Titus v. Perkins.* And see *Dougl.* 731-2. Not.

(z) *Co. Copyh.* s. 41. *Tr.* p. 96. 2 *Bl. Comm.* 371-2. ch. 22.

If the tenant does not come to be admitted on the usual proclamations, the lord (except in the cases of *femes covert* and infants whose estates are protected by the statute of 9 *Geo.*) may seize the lands to his own use till the tenant appear and be admitted; and if there be a special custom for that purpose, [320] may seize them as an absolute forfeiture (a).

In the cases of *femes covert* and infants who are entitled by descent or surrender to the use of a last will, it is provided by statute that if they do not come in to be admitted in person, or the former by their attornies (which they are thereby empowered to make,) or the latter by their guardians, or having no guardians, by their attornies (which they may appoint by virtue of that act,) at one of the three then next courts, the lord or steward, on due proclamation, &c. may appoint such guardians or attornies for the purpose of admission; and

Provisions by
stat. 9 *Geo.*
in cases of in-
fants and
femes covert.

(a) 3 *Durnf. & East*, 162. *Doe d. Tarrant & al. v. Hellier & al.* *Watk. Gilb. Ten.* 230. & *N. C.* p. 442. 1 *P. Wms.* 151. *North v. Earl of Strafford.* 2 *Atk.* 449. *Clayton v. Cookes*, and *ante*, p. [234], &c.

thereupon impose the just fines. And if such fines are not paid as directed by that act, the lord is empowered to enter and take the profits (but without liberty to fell timber) till such fines and the consequent expenses are satisfied, rendering an account of such profit, &c. to the persons entitled*.

But if the husband of a feme covert, or the guardian of an infant, pay such fines, then they may reimburse themselves out of the profits of the estates as directed by that act (b).

[321]
Action at
law.

And, independently of these remedies,

* [The statute, however, is confined to the cases expressed therein; viz. title by descent, or surrender to the use of a will: and does not apply to a title under a deed. And to a bill therefore by the lord, stating a title in remainder by deed of appointment under a settlement, and an admission by the tenant for life without fine, he having paid a fine upon a former admission under his original title, and upon his death, praying a discovery and production of the deed in aid of an action under the statute, a demurrer was allowed. 13 *Ves. Jun.* 240. *Ld. Kensington v. Mansell.*]

(b) 9 *Geo. c.* 29.

thus expressly given by the statute of *George* the first, the lord may maintain an action of *indebitatus assumpsit*, for the fine against an infant who has been actually admitted, on such infant's coming of age: and according to Mr. Justice *Yates*, in the case of *Evelyn v. Chichester* (c), even during his minority*.

For it has now been long settled that debt or *indebitatus assumpsit* will lie for a fine (d). Debt or assumpsit.

And such action of debt or *assumpsit* is not within the statute of limitations (e).

If the lord admit and die before the fine be

(c) 3 Burr. 1717.

* On action the lord need not identify the lands. See 3 Peer. Wms. 148. 151. *North v. Earl & Countess of Strafford*. Bill in equity to ascertain lands. See 4 Ves. Jun. 180. *Duke of Leeds v. Earl of Strafford*, &c.

(d) Carth. 92. *Shuttleworth & Garnett*. Dougl. 722. *Grant & Astle*, and notes.

(e) 1 Levinz. 273, cited in *Hodgson v. Harris*, as so adjudged. 2 Keb. 536, pl. 56. S. C. *Gilb. Ten.* 178.

On the lord's death, the fines then due belong to his executors.

paid, it will belong to his executors; who may bring an *assumpsit* or debt for it (*f*). But it will be *no charge on the lands*; and, therefore, the persons entitled to fines unpaid, can have no action or bill, or other remedy, against a *purchaser* or *surrenderee* for any fines which became payable before the purchase (*g*).

[322]
Waiver of
admittance
by the heir.

It has been repeatedly observed that the fine is not due till admission, and it seems to follow, inevitably, that where the heir waives admittance no fine can be claimed. But it has been doubted by some whether the heir could waive the possession or not: yet such doubt does not appear to be well founded; but, on the contrary, it seems now acknowledged, that he *may* refuse ad-

(*f*) 3 *Lev.* 261. *Shuttleworth v. Garnet*. *Carth.* 90. S. C. 1 *Show.* 35. S. C. So of *Reliefs*. See *Kich.* 147. a. *Fitzh. Avowrie*, pl. 233. 3 *Co.* 66. a. And *Heriot*. See *post.* chap. on *Heriots*. *Fitzh. Avowrie*. 233. Also of *Rent*. 1 *Roll. Abr.* 374. *Chancerie*, (P).
(*g*) 1 *Roll's Abr.* 374. *Chancerie* (P). *Hitcham v. Finch*.

mission, and consequently not be subject to a fine (*h*).

We come now to the third class of fines payable by copyholders;—those which are due on licenses by the lord to empower the tenant to do certain acts; as to demise, &c.

Fines due on license to alien, &c.

There is little to be observed on this head; such fines being rarely due. It is laid down, however, that there must be a *special* custom proved to support the claim of such fine; for, by general custom, fines are due only on admissions (*i*). But if such a custom exist, debt will lie for its recovery (*k*). In the case of *Yaxley v. Rainer* (*k*), the fine was for *licence to aliene*; and there is an express provision in the statute 12 Car. 2. (*l*) to prevent the abolition of any [323]

(*h*) See *Watk. Gilb. Ten.* 292. and No. cxli. p. 462. 3 Burr. 1719. 2 Atk. 449. and 3 Pr. Wms. 151. and *Siderf.* 58. in *Wheeler v. Honour*.

(*i*) *Co. Copyh.* s. 56. p. 127.

(*k*) 1 Lord Raym. 44. *Yaxley v. Rainer*.

(*l*) C. 24. s. 6.

fines for alienation, due by particular customs of particular manors and places, other than fines for alienations of lands or tenements holden immediately of the king *in capite*.

CHAP. VIII.

OF FORFEITURE.

[324]

As the copyholder originally held strictly Nature of. at the will of the lord, and is still regarded by the law as holding at will in cases where the custom of the manor has not restricted that will and protected the estate of the copyholder, so, if the copyholder does any act incompatible with the relation in which he stands as tenant, if he denies his dependency, or refuses to comply with the terms of the grant, the law deems it a determination of the will by which he holds; and the estate shall return to the lord who granted it.

The copyholder, indeed, is not now dependent upon the caprice of his lord; the law and the custom of the particular manor of which he holds, have now, in many re-

spects, protected and established his estate. But then he can only claim the protection of custom while he complies with its dictates. If he regulates not his conduct by the rules which that custom has prescribed, he is not entitled to its favour. If he transgresses the customs of the manor, the customs of the manor can no longer support his estate. While he performs his services, and returns and fulfils the duties of his tenancy, the law interposes in his behalf, and controls the will of his lord; but the law cannot countenance him in doing wrong. If he obeys not the law, the law must withhold its protection.

[325]
What acts shall amount to a forfeiture.

We will, therefore, inquire into what acts of the copyholder will be deemed a determination of the will by which he holds, and amount to a forfeiture of his estate.

But before we proceed we must observe that such acts of the tenant must, from the very nature of the thing, be *wrongful* acts, and that the will to be determined is that *of the lord*; for should the tenant determine *his own will* to hold, by any *rightful* act, it

would indeed be a relinquishment or extinguishment of the tenancy; but it would be wholly different from *forfeiture* at law.

If a copyholder be attainted of treason or felony, his copyhold is immediately forfeited to the lord (m). And this not only as a punishment for his crime, but because his capacity to fill the tenancy is at an end. On attainder he becomes dead in law; and he cannot continue his estate after he has forfeited his existence. And in the cases of corruption of blood he can have no one to inherit his estate, where custom had made it hereditary. In some manors (n), indeed, this corruption does not take place; but, though the father be attainted, the son shall succeed.

Treason or felony.

Copyhold of inheritance is not forfeited by coroner without attainder unless there be a special writ from the manor and i. 116. 116

[326]

3 B. & Ald. 528

If the copyholder be outlawed for a capital crime, the same reasoning seems to apply (o). Till the outlawry be reversed, he

Outlawry.

(m) *Hawk. P. C. b. 2. c. 49. s. 7.* and the books there referred to.

(n) See *Robins. Gov. b. 2. c. 4.* and *infra*, Append. No. I. *Customs of Dymock, co. Gloc.*

(o) See *Gilb. Ten. 242. Watk. Ed.*

has no legal existence, nor can there be any one to perform the services or returns. Besides, as such outlawry amounts to a conviction, his punishment incurs.

Alienation.

If the tenant by copy convey any common-law interest in his lands to another, it is a forfeiture; as such an act is incompatible with his tenancy. Thus if he make a feoffment with livery (*p*), or levy a fine (*q*), it would not only be a determination of his estate at will, but an absolute disseisin of the lord.

So if he make a lease for years without license (*r*), though by parol only (*s*); or

(*p*) *Litt.* b. 74. 4. Co. 21. b.

(*q*) See 3 *Durnf. & East*, 162. *Doe d. Tarrant & al. v. Hellier & al.* And equity will not relieve. 2 *Peere Wms.* 146. *Lady Whetstone v. Sts. Bury.* But a fine levied to bar an equity is no forfeiture. *ibid.* and see *ante*, [63]. The lord must reverse the fine or recovery within the time limited by stat. or he will be barred. See *Doe d. Tarrant v. Hellier, ubi sup.* and 1 *Cruise*, C. 15. and *ibid.* v. 2. c. 14.

(*r*) *Co. Litt.* 59. a. [and note thereto (4).] For one year, and so from year to year. For one year, with

even if it be to commence *in futuro* (t); it [327]
will be a forfeiture of his tenement. So if

covenant that lessee shall enjoy for another year, &c. See 1 *Bulstr.* 189-90. [A lease granted by a copyholder on the former terms, a cause of forfeiture,—on the latter, not; *ibid.* Demise by a copyholder for one year, and from thence from year to year, for the term of thirteen years more, if *the lord would give license, and so as there should be no forfeiture*: held that the license of the lord, &c. was a condition precedent to the lease for the further term of thirteen years, and not being granted, there is no lease at law further than from year to year. 4 *East*, 221. *Doe d. Nunn v. Lufkin & al.* and 11 *Ves. Jun.* 170. *Lufkin v. Nunn.* So an agreement to grant a lease of a copyhold for 21 years if the license of the lord could be obtained, and that in the mean time, until such license could be had, it should be lawful for the lessee peaceably and quietly to enjoy and occupy the premises, has been held not to be a demise for more than one year, and consequently not to create a forfeiture. 2 *Taunt.* 52. *Doe d. Wood v. Morris.* Demise of freehold and copyhold lands at an entire rent: *habendum*, so much as freehold for 21 years, and so much as copyhold for three years, (a demise to that extent being warranted by the custom,) and covenant for renewal of the lease of the copyhold every three years, *toties quoties*, during the 21 years, under the like covenants; and that in the mean time, and until such new leases should be executed, the lessee should hold the said land, as well copyhold as freehold,

he exceed his license; as if he have a license to demise for two years, and he demise for three; or if his license be not in other respects pursued (u).

But a common law interest must actually pass in order to work a forfeiture. For if the copyholder execute a deed of feoffment,

&c.: held that this was only a lease of the copyhold for three years, and that the lessor might, after the three years, recover the premises in ejectment against the lessee, there not having been any fresh lease granted. 2 *Maule & Selwyn*, 255. *Fenny d. Eastham, wid. v. Child*. And see further as to a covenant or promise to demise, *infra*, p. [328], and the books there cited.] Three leases for a year each, &c. to the same person, and all made at one time, deemed *one conveyance and one term*. See *Cro. Car.* 233. *Matthews v. Whetton*. Of proof of lease, &c. see 1 *Bulst.* 189. *Hamlen v. Hamlen*.. [Custom to lease for 31 years without license, good. 1 *Salk.* 185. 1 *Show.* 284.] Instances of leases being made for 40 years, no proof of custom. See *Cro. Eliz.* 351. *Jackman v. Hodgeson*.

(s) *Moore*, 393. *East v. Harding*. *Cro. Eliz.* 498. S. C. *Ibid.* 351. *Jackman v. Hodgeson*. And whether the lessee enter or not. *Moore*, 392. *East v. Harding*.

(s) *East & Harding, ubi sup.*

(u) *Cro. Eliz.* 395. *Jackson & Neal*.

but make no livery, he shall not forfeit (w) : or if, on such feoffment, he even make a letter of attorney to give seisin, it should seem, according to the better opinion, to be no forfeiture till livery be actually made (x).

So if he make a bargain and sale, though such bargain and sale be regularly enrolled, yet no forfeiture will incur (y). For a bargain and sale can only pass what the bargainor has a right to convey. Now the copyholder, being only a tenant at will, can convey nothing by right ; and a bargain and sale cannot operate by wrong, as a feoffment ; it could work no discontinuance at common law : and, consequently, as it can convey nothing, either by wrong or by right, nothing can be conveyed : and, consequently, no interest can pass at all ; and, consequently, no forfeiture can be effected. Besides, a bargain and sale only passes an use*, till the statute, operating upon such

(w) *Co. Litt.* 59. a.

(x) *N. (S)* to *Co. Litt.* 59. a.

(y) *Gilb. Ten.* 255. and *Watk.* cxviii. p. 451.

* So by consequence of a lease (which is in truth a bargain and sale) and release. As no use arises by the

use, transfers the possession. Now the copyholder being only a tenant at will, cannot be seised to an use; and if there be no use raised, the statute cannot attach. Hence, no estate passing, there can be no forfeiture.

Again, with respect to a lease for years, an interest (z) must actually pass. For a promise or covenant to demise, will not amount to a forfeiture; for it is no lease (a).

lease, or at least is not executed by the stat. the lessee is not in possession, and consequently not capable of taking a release. Besides, supposing a release made to a person actually in possession and capable of taking it, it would only pass what the releasor had in him at the time, and could not operate by wrong. See 3 Mod. 151.

(z) For it is not necessary that the lessee should actually enter. See *Moore*, 184-5. *per Anderson*, and *Ibid.* 392. *East & Harding*.

(a) See *Gilb. Ten.* 233-4. *Watk. ed.* [2 *Keb.* 267. *Lenthall v. Thomas.*] 3 *Keb.* 638. *Richards v. Cechy.* [2 *Mod.* 79. S. C. under the title of *Richards v. Sealy.* 1 *Bulstr.* 190. *Hamlen v. Hamlen.* [See also 2 *Taunt.* 52. *Doe d. Wood v. Morris.* 2 *Maule & Selwyn*, 255. *Fenny d. Eastham, wid. v. Child.* and *supra*, p. [326], note (r).]

Again, if a copyholder for life surrender in the court of the lord to the use of another in fee, it will be no forfeiture (b). For a surrender, like a bargain and sale, can only pass what the person making it may lawfully transfer (c). Besides, even on the supposition that such surrender *would* pass the fee, it would be the fee of the *copyhold* interest, and not of an estate at common law; which [329] is essential, as before remarked, to work a forfeiture. A surrender too is made with the privity of the lord, or, which is the same thing, of his steward; and if the lord accept such surrender in fee from the copyholder for life, and admit the appointee accordingly, it will be his own act.

So it is said if the copyholder for life suffer a recovery in the manor court, it will be no forfeiture even of his life estate, without a special custom; as the lord is party to a recovery: besides the estate recovered can be only a copyhold, and not a common law

(b) *Moore*, 753. *Oldcot v. Levell*. 4 Co. 29. a. *Bullock & Dibley*.

(c) *Ante*, ch. 3. p. [52]. [98].

estate, and therefore the dependency is not denied (*d*).

Denial or refusal of services, &c.

Another cause of forfeiture is the denial or refusal of services. For the copyholder, by denying or refusing his returns, thus breaks the condition by which he held. In such case the consideration fails; and, of consequence, the lord is entitled to resume his grant.

If the tenant in open court expressly disclaims being tenant to the lord; if he declares that he owes him no services, and consequently refuses rendering any; these are evident acts of forfeiture (*e*).

[330] So if, when in court, he refuse being sworn on the homage (*f*); or if, when sworn, he refuse to present according to his

(*d*) See *Gilb. Ten.* 235. & *Wash. N. cii.* p. 443.
2 *Mod.* 32. *Keen v. Kirby.*

(*e*) See *Kitch.* 124. b. *M.* 42. *Ed.* 3. pl. 9. f. 25.
Co. Copyh. a. 57. *Tr.* 132.

(*f*) *Co. Copyh.* a. 57. *Tr.* 132.

oath (g) : if, on a *personal* (h) summons, he perform not his suit, without alleging a sufficient cause (i), a forfeiture shall be incurred.

So if he come not in to be admitted on due proclamation, it will be a forfeiture, either *quousque* or absolute, according to the custom (k). Or if, on admittance, he pay not his fine (l).

But we must observe that the refusal of services must be a wilful and absolute refusal to be the cause of forfeiture (m) : for if

(g) *Co. Copyh.* s. 57. *Tr.* 132. *Moore*, 350. pl. 468. 3 *Leon.* 109. *Sir Christopher Hatton's case*, and *Sir R. Southwell & Thurston* cited.

(h) For a *general* summons, as at the church, &c. is not sufficient. *Cro. Eliz.* 505. *Crisp & Fryer*, and *Sir Christopher Hatton's case* cited. *Godb.* 142. ca. 176. *Lord Dacres & Harleston*, and *Winter's case* cited. 1 *Roll. Abr.* 507. *Copyh.* (C) pl. 7, 8, 9. See 1 *Leon.* 104. *Sir J. Braunche's case*, and 3 *Bulst.* 80. *Belfield v. Adams*, & *Gilb. Ten.* 229, 230.

(i) See *Co. Copyh.* s. 57. 1 *Leon.* 104. *Sir J. Braunche's case*.

(k) See *ante*, [230]. [234], &c.

(l) See *ante*, [315]. [319].

(m) *Godb.* 142-3. ca. 176. and *Winter's case*, cited.

[331] it be doubtful whether they be due or not, and the copyholder refuse till they be ascertained (*n*); or if, on the demand of rent, he says he has no money, and so entreats the lord to forbear (*o*), no forfeiture will thereby be incurred (*p*).

Waste.

A copyholder, though regarded as a tenant at will, is obliged to keep the tenements in repair; for which reason he is entitled to botes or estovers by the general law, without alleging a special custom (*q*).

(*n*) *Gilb. Ten.* 230. 2 *Mod.* 229. *Trotter v. Blake.*

(*o*) *Godb.* 142-3.

(*p*) See further *Co. Copyh.* s. 57. *Gilb. Ten.* 235, &c. *Comyn's Dig. Copyh.* (M. 4.) *Viner's Copyh.* N. (*e*), &c.

(*q*) See 1 *Lord Raym.* 551. *Ashmead & Ranger*, and *Gilb. Ten.* 237. *Watk. Ed.* A commission shall go out of chancery to set out sufficient timber for botes, &c. See *Cas. T. Finch.* 199. *Ayray & al. v. Bellingham & al.* If the lord demise the manor, excepting all woods, &c. and the lessee grant by copy, the copyholder shall nevertheless have his botes. So if the copyholder be entitled to botes in the lord's wastes or woods, and the lord alien the wastes or woods, it shall not prevent the copyholder's claim to estovers. 3 *Co.*

He is, therefore, contrary to other tenants at will, or at least to those who hold strictly at will a common law estate (*r*), answerable for permissive as well as for voluntary waste (*s*).

Thus if a copyholder pull down a house (*t*), or suffer it to become ruinous for want of timely reparation (*u*); if he build a new one (*w*); *a fortiori*, if he pull the new [332]

63. *Swayne's case*. See also 13 Co. 67. *Heydon v. Smith*, (3d. point.) 1 Roll. Abr. 508. *Copyh.* (D) pl. 18. *East v. Harding*.

(*r*) *Litt.* s. 71. and *Co. Litt.* 57. a.

(*s*) See *Co. Litt.* 63. a. and *Harg.* N. (1). *Co. Copyh.* s. 57. *Tr.* 134-5. 1 *Salk.* 186. *Eastcourt & Weeks. Owen*, 17-18. Waste is sometimes only punishable by fine. *Vide* Append. No. II. *Customs of Yetminster prima, Co. Dorset*.

(*t*) 1 *Bulst.* 50. *Brocke v. Breare*.

(*u*) *Co. Copyh.* s. 57. *Tr.* 134-5. [A mortgagee of a copyhold may pull down ruinous houses and build much better. The lord has a right to say that the tenant should not let the houses fall; and might seize if he did. *Per* the *Master of the Rolls*, in *Hardy v. Reeves*. 4 *Ves. Jun.* 466.]

(*w*) See *Watk. Gilb. Ten.* 235. and N. (C).

house down again (*x*), he shall forfeit his tenement.

So if by his neglect or misconduct the lands becomes useless or unprofitable; as if he suffer the banks to decay, so that the lands become overflowed or marshy (*y*); or if he change the nature of them; as by turning arable land into hop ground, or a pishchary (*z*), or the like; it will be a forfeiture.

So if he fell timber (except for the necessary botes or estovers (*a*),) unless he be warranted by a special custom (*b*). If he fell

(*x*) *Ibid.* and see 1 *Bulst.* 50. *Brocke v. Beare.*

(*y*) *Co. Copyh.* 2. 57. *Tr.* 135.

(*z*) See *Litt. Rep.* 264, &c. *Paston & Uibert. Hutt.* 102. *S. C. Hett.* 5. *S. C. (Paston & Mann). Gilb. Ten.* 236.

(*a*) *Ante*, p. [231]. (*q*).

(*b*) 1 *Roll. Abr.* 509. *Copyh.* (E) pl. 2. *Fuller v. Terry.* 1 *Lord. Raym.* 551. *Ashmead & Ranger.* 2 *Durnf. & East*, 746. *Mardiner v. Elliott*, and see *Brocke v. Beare*, *ubi sup.* *Fish. on Copyh.* 98, &c. 1 *Leon.* 272. [So if he top timber trees and make them pollards. *Stra.* 447. *Peachy v. The Duke of Somerset.*] Custom for a copyholder for life to cut timber, bad. 1 *Bulstr.* 51. 2 *Durnf. & East*, 746.

timber for botes, he may sell the tops and bark towards defraying the charge of repa-

Mardiner v. Elliott. Lord shall have timber, except by custom. See *Kich.* 80. b. [By special custom a copyholder in fee may cut down trees and sell them at his will. 1 *Roll. Abr.* 560. 1. 25. *Cro. Car.* 221. *Dal.* 8. *Noy*, 2. So a copyholder for life who by custom names his successor; for he has *quasi* an inheritance. 1 *Roll. Abr.* 560. 1. 35. 1 *Brow.* 132. 2 *Brow.* 87. *Noy*, 2. But a copyholder for life, merely, cannot cut down and sell; and a custom that a copyholder not having any further interest than for life, may cut down trees at his will and sell them, is void. 1 *Roll. Abr.* 560. 1. 30. 1 *Bulstr.* 158. 3 *Bulstr.* 81. *Cro. Car.* 221. 2 *Brow.* 85. *Noy*. 2. *Jon.* 245. So if a copyhold be granted to a man and his heirs for three lives, but he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut the timber growing on the estate. 2 *Durnf. & East*, 746. *Mardiner v. Elliot.* Where there is not a special custom for the copyholder to cut, the lord may cut and the copyholder has no remedy against him, though he be copyholder for life, and pleads that he has not sufficient for repairs. *R. contra*, in B. R. and Excheq. but reversed in the House of Lords. 2 *Salk.* 638. 1 *Lord Raym.* 551. "The customs of different manors vary exceedingly; sometimes they give the timber to the lord, sometimes to the tenant. The court of King's Bench once said no custom could give it to the tenant. A great deal of doubt has always been entertained upon that point. Custom makes every thing in a copy-

ration (c). So, as he may not know exactly the quantity which may be necessary, he

The Lord of a
Manor has no
right to enter
on a copyhold
of inheritance
to cut timber
for his own use
leaving sufficient
for the vestment
if there be no
custom in the
manor.
Mitcheam v. Aldworth
4 N. H. S. 342

hold." Per the Lord Chancellor, in *Dench v. Bampton*, 4 Ves. Jun. 700. Lord and tenant may by custom be possessed of a joint interest in trees, *ibid.* It should seem also, that where the property is solely in the lord, he may yet not have a right to enter and take it without consent of the tenant. See 17 Ves. Jun. 282. and *supr.* p. [45]. note *. Where a copyholder of inheritance having power by custom to cut timber surrendered to the use of his will, and devised to A. for life, without impeachment of waste, with remainders over; and A. upon coming into possession cut down timber: though there was no instance, in fact, of a copyholder for life in the manor cutting timber, yet it was held that the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate, may make a tenant for life punishable of waste: and that at any rate the lord cannot enter upon the copyholder for life's estate, as for a forfeiture upon his cutting timber; for the injury, if any, is not to the lord, but to the remainder-man of the inheritance. 10 East, 266. *Denn d. Joddrell v. Johnson.*] Custom for copyholder to have lops and tops. See *Moore*, 546. *Stebbing v. Gosnell.* [And if the lord cut down trees, where by custom the copyholder shall have the lops, an action upon the case lies against him. 1 Roll. Abr. 108. *Ibid.* 196. 1 Brow. 231. And see further as to the rights of lord and tenant with regard to timber. *Gilb. Ten.* p. 237. & *seq.* *Watk. ed.*]

(c) 3 Bulstr. 281. *Sanford & Stevens.*

will be warranted in felling what may appear to be requisite; and may keep the overplus for future use (*d*). But if he suffer timber, [333] felled under the pretence of estovers, to decay and become useless (*e*); or apply it towards the reparation of other tenements (*f*), it will be a forfeiture at law*.

(*d*) See 1 *Roll. Abr.* 508. *Copyh.* (D). pl. 19. and *Cro. Eliz.* 498. *East & Harding*. [And see *Moore*, 508. S. C. adjudged, though employed five years after cut down, and after an entry as for a forfeiture. Where a copyholder for life cut trees, though none were applied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair: adjudged to be a question for the jury, whether they were cut *bona fide* for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were about to be applied to any other purpose, the court refused to set aside a verdict for the defendant. 11 *East*, 56. *Doe d. Foley v Wilson*.]

(*e*) 1 *Roll. Abr.* 508. *Copyh.* (D) pl. 20. [*Moore*, 392. S. P. *per Cur.*]

(*f*) See 2 *Vern.* 537. *Nash v. Com. Derby*.

* But if a person have two copyhold tenements held of the manor, and he cut down timber on one to repair the buildings, &c. of the other, a court of equity will relieve. See 2 *Vern.* 537. *Nash v. Com. Derby*. 1 *Stra.* 450. *Preced. Chanc.* S. C. And see 1 *Bro.*

And as the copyholder cannot fell the timber, so he cannot dig for mines*. He is tenant at will, and has no right to the soil (g). But it seems that he may dig for marl to manure the lands with, or take turf for necessary fuel, and it will be no forfeiture; as these seem to be proper estovers (h).

Ch. Ca. 194. *Lee v. Alston*. [And see further as to relief in equity against a forfeiture, *infra* p. [352].] Copyholder cut down timber and sold it, and laid out the money in botes, &c. See 4 *Ves. Jun.* 702, &c.

* [Nor open a new stone quarry. 1 *Str.* 447. *Peachy v. the Duke of Somerset*.]

(g) See 2 *Atk.* 189. *Dean and Chapter of Ely v. Warren*. 1 *P. Wms.* 406. *Bishop of Winchester v. Knight*. *Gilb. Ten.* 327. [Custom found for tenants of a manor to dig gravel and sand on the wastes. 2 *Durnf. & East*, 391. *Dudery v. Page*, and see 6 *ibid.* 741. *Shakespear v. Peppin*, & 748. *Peppin v. Shakespear*. With regard to the lord's power as to mines, *d. supr.* p. [45]. in *not.*]

(h) See *Gilb. Ten.* 327. [In *fenny* countries a copyholder may by custom be possessed of a right to dig up the lord's soil for turf, by way of compensation, as it should seem, for the injury which his estate is liable occasionally to sustain from floods, &c. 2 *Atk.* 189. *The Dean and Chapter of Ely v. Warren*. But a custom for all customary tenants of a manor, having gardens

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So a copyholder may forfeit by abating ancient enclosures; or by inclosing where no inclosure was before (i). So, by abating, removing, or confounding landmarks (k).

parcels of their estates, to take pasturable turf at all times when necessary, and in unlimited quantity, from a waste within the said manor, formaking and repairing grass plots in such gardens, or for making and repairing the banks and mounds of the hedges and fences of such customary estates, is bad; as being indefinite and uncertain, and destructive of the common. 7 *East*, 121. *Wilson v. Willes*.]

(i) See *Preced. in Chanc.* 568. *Sir H. Peachy v. Duke of Somerset.* 1 *Strange*, 447. S. C. *Vin. Copyh.* 113. (D. c.) pl. 9. S. C. *Hutt.* 102. *Paston v. Utbert.* *Litt.* 264. S. C. and *Hell.* 5. S. C. by the name of *Paston & Mann.*

(k) See the books referred to in (i). Lord may bring his bill of discovery in case of confusion of boundaries. 2 *Atk.* 449. *Clayton v. Cookes.* [And upon such bill the Court of Chancery will order a commission to issue to distinguish copyhold lands within the manor from freehold, and compounded from uncompounded copyholds, and to ascertain the boundaries: and if they cannot be distinguished, to set out lands of the tenant of equal value with so much of the copyhold lands as cannot be distinguished. 4 *Ves. Jun.* 180. *The Duke of Leeds v. The Earl of Strafford.* And per the Lord Chancellor,—It is the duty of

Tearing the
rolls, &c.

[334]

If the steward shew a court-roll to a copyholder to prove that the land is holden by copy, and the copyholder say he is a freeholder, and shew a deed, pretending thereby to procure his land to be freehold, and tear in pieces the court-roll, it will be a forfeiture (*l*).

So, if he forge a customary to the injury of the lord (*m*).

tenant to keep the boundaries. That is the foundation of the bill. The confusion of boundaries does not infer any negligence on the part of the lord; for the tenant is in possession of the land. *Ibid.*] And see 3 *Atk.* 82. and 3 *Anstruther*, 668. note. *Lord Abergavenny v. Thomas*. If the tenant confound the boundaries in order to prevent a distress, the lord will be entitled to a commission. 1 *Bro. Ch. Ca.* 201. 3 *P. Wms.* 151. 1 *Ves.* 171. Bill for discovery of waste, however, demurred to, as it would subject the tenant to a forfeiture; and demurrer allowed. *Bunbury*, 192. *Attorney General v. Vincent*. 1 *Ves.* 56. *Lord Uxbridge v. Staveland*. [And note, that for waste committed by a copyholder, the lord has no equity for an injunction and account, but is confined to his legal remedy. 4 *Ves. Jun.* 700. *Dench v. Bampton*; and *vide infr.* p. [349]. note (*c*).]

(*l*) *Co. Copyh.* s. 57. *Tr.* 132.

(*m*) See 3 *Leon.* 107. *Taverner v. Cromwell*; &

If the same person holds several acres of land of the same manor by several tenures, ^{What shall be forfeited.} as *Black-acre* by the rent of three-pence, and *White-acre* by the rent of four-pence, and *Green-acre* by the rent of six-pence, and commits waste in part of *Black-acre*, or makes a feoffment of part of *Black-acre*, or denies the rent of that acre; he shall forfeit the whole of *Black-acre*; but it shall be no forfeiture of *White* or of *Green-acre*. For, although they are all held by the same person, and perhaps included in the same copy, yet every acre is severally held; and to every acre there is a several condition in law *tacite* annexed; and, therefore, the forfeiture of one cannot be the forfeiture of any of the others (*n*).

But though any act of the copyholder [335] which is confined to one tenement, cannot be the cause of forfeiture as to the others, yet it should seem that any such act which is confined to *part* of the single tenement

Dyer, 322. b. S. C. And note, such forgery is expressly within the stat. 5 *Eliz.* c. 14. s. 2.

(*n*) 4 Co. 27. a. *Taverner & Cromwell*.

shall be a forfeiture of the whole of that single tenement. It is acknowledged that it is so as to waste; as if the copyholder commit waste in part of that single tenement, as by cutting down a single tree, the whole tenement shall be forfeited (o). But we are told by *Rolle* (p), that if the tenant, holding several acres by the same tenure, make a feoffment of one acre only, that one acre only shall be forfeited: yet *Sir Edward Coke* tells us (q) that a feoffment of part of the tenancy is the forfeiture of the whole. And although Chief Baron *Gilbert* (r) thinks the reason is with *Rolle*, and that it would even hold as to waste in cases where there were no buildings on the premises, yet we should consider that as such feoffment or act of waste is incompatible with the relation which the tenant bears to the lord (s), it must be a forfeiture of the *tenancy*, or a *dissolution of that relation*. By such act

(o) *Ibid.* 1 *Roll. Abr.* 509. *Copyh.* (E) pl. 2.

(p) 1 *Roll. Abr.* 509. *Copyh.* (E) pl. 1. cites *Fuller & Terrye* as so adjudged.

(q) 4 *Co.* 27. a. *Taverner & Cromwell*.

(r) *Ten.* 247.

(s) See *ante*, p. [324].

the tenant has broken the reciprocal obligation, and shewn himself unworthy of the confidence reposed in him. [336]

The act of the particular tenant shall not be a forfeiture of any remainders over (*t*), though such remainders be contingent (*u*); nor shall it be a forfeiture of a reversion (*w*).

If a copyholder lease by license of the lord, and the lessee make a feoffment, the term of years only shall be forfeited, and not the estate of the copyholder (*x*). So, if, after such lease by license, the copyholder commit any act of forfeiture, the lease shall

(*t*) 1 *Roll. Abr.* 509. *Copyh.* (F). and *ibid.* 568. *Customs* (G). pl. 5. *Baspool v. Long. Cro. Eliz.* 879. S. C. *Redsal v. Lacon*, there cited. *Co. Copyh.* s. 59. *Tr.* 138. *Gilb. Ten.* 244, &c. and *Watk.* No. cvii. Unless there be a special custom. See 9 *Co.* 107. a. and *quære*.

(*u*) See *ante*, ch. 5. p. [194], &c.

(*w*) *Co. Copyh.* s. 59. *Tr.* 138.

(*x*) 1 *Roll. Abr.* 509. (F). pl. 4. cites *White & Hunt*, as so adjudged.

not be forfeited; but will remain good against the lord (*y*).

But such copyholder shall, in consequence of his own act, forfeit his reversion or remainder (*z*); for such reversioner or remainder-man is in the seisin or tenancy.

[337] But a person having only an equity cannot forfeit (*a*): for he is not a tenant.

If a person be wrongfully admitted to a copyhold and commit a forfeiture, and afterwards the person having the right release to him, it has been said that the lord cannot enter, as the person has, in consequence of such release, a different estate from that of which the forfeiture was committed (*b*). But

(*y*) 2 *Rolle's Rep.* 372. cited as so adjudged. See *Watk.* No. cliii. to *Gilb. Ten.* p. 469. And the lord cannot enter during such lease.

(*z*) 1 *Leon.* 1. *Borneford & Packington.*

(*a*) 2 *Wils.* 13. *Roe d. Jeffereys v. Hicks. Ca. Copyh.* s. 59. *Tr.* 138. and *ante*, ch. 3. p. [101]. *Cestuy que trust* levies a fine,—no forfeiture. See 1 *P. Wms.* 146. and 3 *Atk.* 729.

(*b*) See *Gilb. Ten.* 248-9.

this opinion does not seem law (c): for the person admitted was as much tenant to the lord before the release as afterwards; and the lord ought not to be injured by the private agreement of the parties.

A person *non sanæ memoriæ*, an idiot, or lunatic, are incapable of forfeiting (d). So Who may forfeit.
of an infant under the age of discretion (e).

But an infant above the age of discretion, and under that of twenty-one years, shall forfeit, if he does any act to the disherison of the lord. If he does voluntary waste, or wilfully refuses his services; if he commits treason or felony; he shall forfeit his lands (f). [338]

But if he make a lease for years without

(c) See *Watk. N. cviii. to Gilb. Ten. 445.*

(d) *Co. Copyh. s. 59. Tr. 136.*

(e) *Ibid.* A trustee may forfeit. See *Preced. in Chanc. 573. 1 Strange, 454.*

(f) *Ibid.* and see the case of *Sir H. Peachy v. Duke of Somerset, Prec. Chanc. 568. 1 Str. 447, &c.*

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license, contrary to the custom (*g*), or replevy against the lord, or the like (*h*), he shall not forfeit; nor shall he be answerable for permissive waste (*i*). So he shall not forfeit for not coming in to be admitted on proclamation made (*k*).

A feme covert shall not forfeit by reason of her own act (*l*), unless it be for treason or felony (*m*); but if she do any act which may amount to a forfeiture, with the consent of her husband, she shall lose her lands (*n*).

And if an husband commit waste, or any other act which tends to disherison (*o*), or if he refuse his services (*p*), the tenements

(*g*) See *Gilb. Ten.* 293. and *Watk. N.* cxliv. p. 463.
See also 1 *Show.* 87.

(*h*) *Co. Copyh.* s. 59. *Tr.* 137.

(*i*) *Ibid.*

(*k*) See *ante*, ch. 6. p. [234]. and stat. 9 *Geo.* c. 29.

(*l*) *Co. Copyh.* s. 59. *Tr.* 136.

(*m*) See 1 *Hawk. P. C.* c. 1. s. 11. 4 *Bl. Comm.* c. 2. p. 29. and c. 29. p. 382.

(*n*) *Co. Copyh.* s. 59. *Tr.* 136-7.

(*o*) 4 *Co.* 27. a. *Clifton & Molineaux.*

(*p*) See *Cro. Eliz.* 149. *Hedd & Chalener.*

of the wife shall be forfeited. But if he [339]
make a lease unwarranted by custom without license, it is said it will not be a forfeiture, at least not after his death, unless the wife do any thing to affirm it (*q*). So, if the husband commit felony or treason, it should seem that it would be no forfeiture of the wife's estate; as he could only forfeit what he had in himself (*r*).

But if a stranger commit waste without the consent of the husband, it is said to be no forfeiture, though the wife consent (*s*). Yet it should seem, from later authorities, that, at least in other cases, a forfeiture shall incur by reason of the act of a stranger; and the copyholder must have his remedy over against him (*t*).

(*q*) 1 *Roll. Abr.* 509. *Copyh.* (F). pl. 5. and the books cited in 6 *Fin.* 140. *Copyh.* (S. c.) pl. 5. and *Hedd v. Chalener*, *ubi sup.* *Cro. Car.* 7. *Saverne & Smith*.

(*r*) See *Staundf. P. C.* 187. b.

(*s*) *Co. Copyh.* a. 59. *Tr.* 137. 4 *Co.* 27. a. *Clifton & Molineaux*.

(*t*) See *Watk. Gilb. Ten.* 235. N. (*d*).

But equity may relieve. See *Toth.* 237-8. *Taylor & Hoos*, and cited in 6 *Fin.* 152. *Copyh.* (E. d.) pl. 2.

If a guardian commit waste, he shall forfeit the wardship only, and not the inheritance of the copyhold (*u*).

[340] If a joint-tenant commit waste, he shall forfeit only his own part, and not that of his companion (*w*). But it is said, if husband and wife be joint copyholders of the purchase of the husband, and the husband be afterwards, during the coverture, attainted of felony, no forfeiture can accrue, as the wife must take by survivorship; but if the purchase had been *before* marriage it would have been a forfeiture of a moiety (*x*).

Who shall
take advantage
of a forfeiture.

We have already observed that a copyholder holds at the will of his lord, and that by an act which is regarded as a cause of forfeiture, he determines that will by breaking the conditions on which he held. The tenancy being, therefore, at an end, in consequence of such act, it must necessarily follow, from the very nature of the thing,

(*u*) *Co. Copyh.* s. 59. *Tr.* 137.

(*w*) *Ibid.* *Tr.* 138.

(*x*) *Supplem. to Co. Copyh.* s. 10. *Tr.* 175.

that it must be the lord who is entitled to enter.

Even in the case of treason, therefore, the lord, and not the king, shall have the copyholds of the person attainted; unless, indeed, such copyholds be *expressly* given to the king by a particular act of parliament. But they shall not be forfeited to the king by the general words of a statute (*y*), by reason of the manifest injury which would accrue to the lord; as the king could not hold them, if forfeited, as a copyholder, and consequently the tenure, and all the fruits of that tenure, would be lost, or at least suspended (*z*). [341]

And so if a copyhold be granted to *A.* for life with remainder to *B.*; and *A.* commit a forfeiture; the lord shall take advantage of it, and not *B.* For by *A.*'s act, the tenancy, as to him, became extinguished or destroyed; and, consequently, the lord be-

(*y*) See 2 *Vent.* 38. *Lord Cornwallis's case.*

(*z*) *Ante*, ch. 2. p. [31].

came entitled to the premises, and no one else could claim. *B.* will be entitled to the remainder on *A.*'s death; but he will not be entitled till that event, by the express words of the grant. He could not be entitled to any remnant of *A.*'s estate, if any such remnant existed; but by the act of forfeiture *A.*'s estate was wholly at an end. The lord, therefore, must be, by the very terms, entitled till the death of *A.*(*a*).

But with respect to the duration of the estate forfeited by *A.* and the commencement of the estate so limited to *B.* we must observe, that if *A.*'s estate be limited to him for life, generally, without saying expressly for his natural life, it shall be determined on his *civil* death; and, consequently, on such his civil death, *B.*'s estate shall commence(*b*).

[342]

But if *B.*'s estate be expressly limited to

(*a*) 1 *Roll. Abr.* 509. *Copyh.* (G). pl. 1. and *ante*, ch. 5. p. [197]. [See also 2 *Maule & Selwyn*, 68. *Doe d. Folkes & al. v. Clements.*]

(*b*) See *Watk. N.* cxxiii. to *Gilb. Ten.* 454. and 2 *Show. Rep.* 150. *Benson v. Strode.*

commence on the forfeiture or determination of A.'s estate, though the lord, from the very nature of the thing, would be equally entitled to the estate forfeited, yet he should not be suffered to retain it contrary to the express words of his grant (c).

We will now, therefore, proceed to inquire, who may be such a lord as to be capable of entering for a forfeiture?

And here we may observe, generally, that any one who is *dominus pro tempore* may take advantage of a forfeiture committed within his own time (d).

And a person shall sometimes take advantage of a forfeiture who was not, properly, a lord at the time, nor at any time afterwards; as the grantee of the freehold of the copyhold, or his lessee: for by the grant, the premises were severed from the manor;

(c) 3 Lev. 94. *Strode v. Dennison*. *Watk. N.* (h) to *Gilb. Ten.* 173.

(d) See *Roll. Abr. Copyh.* (G). *Comyn's Dig. Copyh.* (M. 6.) and *Vin. Copyh.* (T. c.) &c.

[343] and no manor was constituted by the grant; the grantee therefore can be no lord:

But the very lord by such grant passed his own interest; though he could not pre-judice the tenant's estate: the freehold, therefore, passed to the grantee, subject to the copyholder's claim: now by the act of forfeiture that claim was immediately at an end; and consequently the grantee would be entitled to enter (e).

"Regularly, it is true," says Sir *Edward Coke* (f), "that none can take benefit of a forfeiture but he that is lord at the time of the forfeiture." And in order to ascertain who may enter for a forfeiture committed before his own time, we must distinguish between the cases in which the lord takes, *first*, by way of remainder; *secondly*, by descent; and *thirdly*, by the grant of the preceding lord.

(e) *Ca. Copyh.* s. 60. *Tr.* 140. 1 *Roll. Abr.* 509, 510. *Copyh.* (G). pl. 3. & 4. *East & Hardinge*, and *Moore*, 303. S. C.

(f) *Ca. Copyh.* s. 60. *Tr.* 139.

Thus, if there be tenant for life of a manor with remainder over to a stranger in fee, and a copyholder commit waste, and then the tenant for life die before entry; he in remainder may, it is said, enter; for he had an interest in the manor at the time of the forfeiture committed, though he could not enter by reason of the estate in the tenant for life; but which being determined, his entry is now accrued for the forfeiture committed in the life of the tenant for life (g). [344].

If the act of forfeiture be such as to work a disinherison to the lord, as if the estate be destroyed, as in case of feoffment, fine, or recovery, the heir of the lord in whose time it occurred shall take advantage of it: but not otherwise (h).

And as to the alienee, grantee, or lessee of the manor, it should seem that he cannot take advantage of a forfeiture which ac-

(g) *Co. Copyh. s. 60. Tr. 139.* but see *Cro. Jac.* 801. *Lady Montague's case, contra.*

(h) See 3 *Durnf. & East*, 162. *Doe d. Tarrant v. Heller. Freem. 516. Ca. 692.*

ceded before his own time; even in the case of disherison (i).

[345] But if a copyholder, holding of a manor belonging to a bishoprick, commits a forfeiture, as by felling timber, during the vacancy of the see, the succeeding bishop may bring ejectment (k). This case, however, differs from the preceding: in those there was a lord at the time of the forfeiture who might have taken advantage of it if he pleased; but, in the present case, there was no one to whom laches could be imputed.

If there be several coparceners of a manor, and a forfeiture incur, and one die before en-

(i) Co. Copyh. s. 60. Tr. 159. 2 Vent. 38, 39. *Lord Cornwallis's* case. But it should seem that the lord ought to have known of the cause of forfeiture. In *Owen*, 63. *Penn & Merivall*, the copyholder made a lease and the lord made a feoffment, and the feoffment was considered as an assent that the lessee should continue his estate; and so was in the nature of an *affirmance* and *confirmation* of the lease. Now does it not seem necessary that the lord should know of the lease before he can be supposed to *affirm* it?

(k) *Hall v. Will. Price*, 109. *Wood v. Allen*, cited.

try, the others, it is said, cannot enter (4). So when the cause of forfeiture descends to coparceners, they must all agree as to taking the advantage of the forfeiture, or one alone shall not be permitted to enter: so if one die, the other cannot seize (m).

Whatever may be the act of the copyholder, yet, in order to remove the estate out of him, the lord must actually avail himself of the forfeiture by seizing into his hands (n) the tenements forfeited, by the entry (o) of himself, or agent, as his bailiff,

How and at what time a forfeiture is to be taken advantage of

[346]

(l) See 1 *Freem.* 516. ca. 692.

(m) *Ibid.* and 1 *Salk.* 186. *Eastcourt & Weeks.*

(n) *Gillb. Ten.* 247. 2 *Show. Rep.* 152. *Benson & Strode.* 3 *Durnf. & East*, 173. *Dot d. Tarrant v. Hellier.* But if the copyholder commit a forfeiture, the lord may grant the copyhold before seizure. See 1 *Lev.* 26. *Milfax v. Baker.* and see *Dyer*, 145. b. pl. 62. *Ball. N. P.* 107. But he cannot enter for waste done before presentment. 4 *Feet. Jun.* 707. *Donch v. Hampton.* See *Gra. Eliz.* 499. *contra.* Of the relation to the cause of forfeiture, see *Milfax & Barker*, *ubi sup.* and 2 *Hawth. P. C.* ch. 49. s. 30. 32.

(o) In the case of *Tarrant & Hellier*, (3 *Durnf. & East*, 173-8.) the court seemed to think that the lord could not enter for a forfeiture after twenty years.

&c. (*p*), or by the exertion of some act of ownership which may be tantamount to such seisure, as by granting them again for years (*q*).

In many cases the lord may enter immediately into the lands without the intervention of a presentment of the forfeiture: in others a regular presentment is previously requisite, or at least advisable.

Where the offence which is the cause of forfeiture, is in its very nature apparent and notorious, and such as by common presumption the lord cannot avoid noticing (*r*), no presentment can be necessary, as a presentment is only for his instruction (*s*).

(*p*) See 2 *Show.* 152. *Benson & Strode*. The lord or steward need not issue a precept: nor need the steward show any particular authority. 2 *Mod.* 229. *Trotter v. Blake*.

(*q*) See 1 *Levinz.* 26. *Mitifax v. Baker*.

(*r*) See *Co. Copyh.* s. 57. *Tr.* 131.

(*s*) Sir *T. Jones*, 190. *Benison & Strode*, and see *ante*, p. [79], &c.

If a person, therefore, be attainted of treason or felony, the lord may seize without any presentment by the homage; since the commission of the offence is ascertained and made of publicity by his conviction in a court of law (t).

So if the forfeiture be in consequence of any act or refusal in the presence of the lord, as in open court, no presentment can be requisite; as the end of presentment is already answered. Thus if proclamation be made for an heir to claim, and no claim be made: if a copyholder be personally warned to do suit at a particular court, and he does it not; or if he appear in court and openly [347]

(t) *Benson & Strode, ubi sup. 2 Vent. 38. Lord Cornwallis's case.* The lord may also take advantage of a forfeiture for cutting timber before any presentment. *Cro. Eliz. 499. East v. Harding.* And he need not prove presentment or seizure on ejectment being brought. See *Bull. N. P. 107.* And note, if the lord need not prove seizure, may not a suit to set out boundaries be often dispensed with, by bringing ejectment, and on a writ of execution being awarded, the sheriff summoning a jury to ascertain the property as on a *feri facias*? C. W. which will be seen.

[349]

But if he be attainted *and pardoned*, the forfeiture shall not be purged (a); since the pardon necessarily confesses his guilt which was the cause of forfeiture; and the king cannot remit the claims of the lord.

And before we dismiss this subject, we may observe, that forfeitures are always odious in the estimation of the law (b); and, on litigation, the courts demand the most direct and certain proof of the cause of forfeiture, on the part of the lord, before they countenance his seisure (c).

viction, the forfeiture seems complete; and if the lord seize, can the premises be divested by the allowance of clergy. See 2 *Hawk. P. C.* ch. 33. s. 129. and 4 *Bl. Comm.* 373*. c. 28. And therefore *quare* as to the case of *Jony v. Pawly*, as to this point.

(a) 2 *Show. Rep.* 150, &c. *Benson & Strode*. Sir T. Jones, 189. S. C.

(b) *Watk. N.* xcix. to *Gill. Ten.* 441.

(c) 1 *Bulstr.* 190. *Hamlen v. Hamlen*. & 3 *Dunf. & East*, 169, 170-3. *Per Kenyon, C. J. & Hutton*, 109. [And note, that with regard to waste committed by a copyholder, the lord is confined to his legal remedy, and has no equity for an injunction and account. 4 *Ves. Jun.* 700. *Deneh v. Bampton*. And *per* the LORD CHANCELLOR, "Suppose a case in which the estate is

We have already observed, that although Dispensation.
the copyholder commit any act which may be the cause of forfeiture, yet the estate is not out of him till the lord actually seize. If the lord, therefore, exert not his right; does not insist on and absolutely avail himself of the forfeiture, the copyholder will still remain tenant of the premises. The lord, if he pleases, may waive the forfeiture: and if he does any thing which may amount to an acknowledgment of an existing tenancy, or confirm the estate, after notice of the forfeiture, he shall be for ever precluded from taking advantage of the event.

Any person who is lord by right, who Who may
might have taken advantage of a forfeiture, dispense.
may dispense with it, though he be but a

not worth the timber that was growing upon it, and which is cut down by the tenant: could the lord bring an action of waste? I apprehend there can be no action of waste between the lord and tenant. The lord can get no more than the forfeiture. — — — The law settles the matter between the lord and the tenant. If by committing waste a forfeiture is incurred, the lord proceeds for the forfeiture; and it is a question at law whether the act done is a forfeiture or not." *Ibid.*]

[350] tenant at will; and it shall be a dispensation not only as to himself, but as to him in reversion also. But a lord by wrong, as a disseisor, cannot purge a forfeiture as to a rightful lord(d).

Notice.

But we must be mindful, that, in order to effect a dispensation, *the lord must have notice of the forfeiture*; for if the cause of forfeiture be unknown to him, he shall not be precluded by his subsequent act from availing himself of it(e).

What acts
may be dis-
pensed with.

As to what causes of a forfeiture may be dispensed with, we may remark, with Sir Edward Coke(f), that some make a difference between those forfeitures which tend to the destruction of the copyhold, and those which do not: as if the copyholder make a feoffment; "by this the copyhold is

(d) 1 Lev. 36. *Milifax v. Balan*.

(e) Cro. Car. 933. *Mathews v. Whetton*. 1 Roll. Abr. 475. Confirmation (C) pl. 1. Co. Copph. s. 61. Walk. Gilb. Ten. 247-8. And see 4 Leon. 240. *Wheeler's case*.

(f) Co. Copph. s. 61.

destroyed; and, therefore, no subsequent acknowledgment of the lord," says he, "will ever salve this sore."

A feoffment operates immediately by livery, and works a disseisin. It binds even the lord till it be defeated by an act of equal notoriety. But it has been determined (g) that a fine levied by a copyholder may be waved as the cause of forfeiture, as the fine would be void against the lord, the copyholder continuing in possession. These cases, therefore, essentially differ. [351]

If a copyholder be attainted of treason or felony, perhaps no dispensation could take place. By the attainder the tenancy is absolutely at an end; and the copyholder is dead in law (h). Though dispensation is much favoured: however, in this case, if the lord does not wish to avail himself of the forfeiture it would be advisable to make a new grant to the copyholder, if pardoned, or to his descendants, if not.

(g) 3 Burnf. & East, 162. *Doe & Tarrant v. Hebbler*.

(h) See Sir T. Jones, 189. *Benson v. Strode*.

FORFEITURE.

Other acts, however, which go not to the destruction of the copyhold, or the utter incapacity of the tenant, may be dispensed with by the lord: as waste, non-admission, subtraction of suit or services, or the like.

What shall
be a dispensation.

And any act of the lord, after forfeiture, (*the lord being apprised of such forfeiture,*) whereby he acknowledges the copyholder as his tenant, shall be a dispensation (i). As if the ancestor be presented as dying seised, and proclamation be made for the heir to claim, though no actual admission take place (k).

[352] So if he admit him after forfeiture (l): if he accept a surrender from him *, or rent (m),

(i) *Co. Copyh.* s. 61. *Gilb. Ten.* 247-8.

(k) 3 *Durnf. & East*, 162, &c. *Doe d. Tarrant v. Hellier*.

(l) *Ibid.*, 1 *Lev.* 26. *Mitfax v. Baker*.

* 1 *Freem.* 517.

(m) 1 *Salk.* 186. *Eastcourt & Weeks*. 1 *Keb.* 15. *Garrard & Lyster*. P. *Twisden*. See *Gilb. Ten.* 224. 1 *Freem.* 517. But acceptance of rent was said in *Doe d. Tarrant v. Hellier*, (3 *Durnf. & East*, 171.) to be of an ambiguous nature, and not of itself a dispensation.

or other services (n); if he amerce him for default of service (o); or distrain on the lands for rent (p); it shall be a dispensation of the forfeiture.

If a copyholder does any act which would be a forfeiture at law, he shall, in certain cases, find relief in equity, and the lord be prevented from taking advantage of such act. Relief in equity.

But equity will not relieve against a voluntary act; nor unless a compensation can be made to the lord (q).

But where waste has been inadvertently done (r), or done by a stranger (s); or fines

(n) See *Gilb. Ten.* 247-8.

(o) 1 *Leon.* 104. *Sir John Braunche's case.*
1 *Freem.* 517.

(p) *Co. Copyh.* a. 61.

(q) *Preced. in. Chanc.* 568. *Sir H. Peachy v. Duke of Somerset.* *Str.* 447. *S. C.* 6 *Vin.* 113. (D. c.) pl. 9. *S. C.* 2 *Freem.* 137. c. 170. *Bishop of Worcester v. ———.* And see as to relief, 4 *Ves. Jun.* 704-5.

(r) See 2 *Vern.* 537. *Nash v. Com. Derby.* *Preced. Chanc.* 574.

(s) *Toth.* 237-8. *Taylor v. Haec,* cited *Vin.* 152. *Copyh.* (E. d.) pl. 2.

[353] or rents have been unpaid (t) ; Chancery has relieved.

So in cases where the act of the tenant was in itself indifferent, though amounting to a forfeiture at law ; as where a quaker refused to take the *oath* of fealty (u).

(t) See 2 Str. 453. *Prec. Chanc.* 572.

(u) See *Prec. Chanc.* 574. *Edwards & Cotton*, 44
2 Vern. 604. *Cox v. Higford*.

CHAP. IX.

OF EXTINGUISHMENT AND SUSPENSION.

[334]

WHEN a freehold and a copyhold interest What.
in the same premises unite in the same person and in the same right, the copyhold interest becomes extinguished; but if they are vested in the same person in different rights, the copyhold interest is suspended only:

And, first, in order to effect an extinguishment, "the freehold and copyhold interests (w) must be of *the same premises*:" The freehold and copyhold interests must be of the same premises.
for if A. be tenant by copy of *White Acre*,

(w) A copyholder may be the *bailiff* of the manor; for a bailiff has no interest; and, consequently, the copyhold would not be extinguished. See *Cro. Jac.* 84. & 167. in *Gibson & Searl*.

and the lord enfeoff him of *Black Acre*, the tenure of *White Acre* will not be extinguished, as *A.* may hold the one by copy and the other by deed.

But they need not be commensurate nor confined to the same premises.

[355]

Lease for years.

But the interests need not be commensurate with each other, nor be confined to the same premises, so the same premises be included in both tenures.

Thus, if *A.* be a copyholder in fee and accept a common-law lease for years of the premises (*x*), or a lease for years of the entire manor (*y*), his copyhold interest will be extinguished*.

Or if *A.* be lessee of the manor, and *B.* a copyholder in fee, and *B.* bargain and sell his copyhold to *A.* and his heirs, the copy-

(*x*) 1 Brownl. 32. 4 Co. 31. a. *Sir Wm. Jones*, 462. *Dugworth v. Radford*.

(*y*) *Moore*, 185. pl. 390. which also cites *Hide & Newport* as so adjudged, and so also in 4 Co. 31. b. *Frenche's case*.

* And by consequence his widow shall lose her freebench. *Sir Wm. Jones*, 462. *Dugworth v. Radford*. And see *Cro. Jac.* 126. *Lashmer v. Avery*.

hold interest shall be extinguished for ever (z).

Again, if a copyholder in fee in possession purchase the reversion of the manor, it will be a present extinguishment; and the particular tenant of the manor may enter into the copyhold premises immediately on the transfer of the reversion (a). Reversion.

If a copyholder be seised in tail and take a grant of the manor, the copyhold interest; though in tail, will be extinguished: for when the interest of the lord of the manor is united with the copyhold in tail, there must be a merger (b). Estate tail.

And whenever the interests become united, the extinguishment is complete; and although the estate of freehold be defeated, [356]
Defeasible estate.

(z) *Hutt. 65. Blemmerhasset v. Humberstone. Sir W. Jones, 41. S. C. Godb. 101. ca. 117. and see N. (4). to Co. Litt. 59. a. Hale's MSS.*

(a) *Calth. 97.*

(b) 2 *Ves. Jun. 525. Challoner v. Murhall, ante, ch. 4. p. [296]. Of Entails.*

the copyhold interest cannot possibly revive, as by the extinguishment it was utterly at an end. Thus if the copyholder be enfeoffed on condition, and the condition be broken and the lord enter, the copyhold interest is absolutely gone (c).

Lease of the whole manor.

Again, it is not requisite that the interest be confined to the same premises, so the same premises be included in both tenures. If the tenant of one acre by copy take a lease of the whole manor, it will be an extinguishment of the copyhold tenure as to that acre; for the freehold of that acre was included in the manor (d).

Joint tenancy.

So if he purchase the manor to hold to himself and another in joint-tenancy, the copyhold will be extinguished; for each joint-tenant is seised *per mie et per tout* (e).

The interests must be united in the same person ;

Secondly, " The interests must be united

(c) See 4 Co. 31. a.

(d) See *ante*, last page; and see also 2 Ves. Junr. 524. *Challoner v. Murhall*.

(e) *Calth.* 97. and see *Calth.* 92.

in the same person." for while they continue separate no extinguishment can take place.

If *A.* therefore, hold one hundred acres by copy, and the lord grant the freehold of those acres to *B.* the interest of *A.* will not [357] be in consequence extinguished(*f*), though *B.* was enfeoffed to the use of *A.* (*g*).

But if *B.* afterwards convey the freehold to *A.* an extinguishment would be effected; as the interests would be no longer distinct(*h*). So if the copyholder release to the grantee of the freehold*.

If a copyhold be granted to *A.*, *B.*, and *C.* *successivè*, i. e. to *A.* for life, remainder to *B.* for life, remainder to *C.* for life, and *A.* take a lease of the lands by deed, it will,

(*f*) 4 Co. 24. b. *Murrell & Smith.*

(*g*) *Cro. Jac.* 573. *Waldoe v. Bartlet.* *Hob.* 181. *Howard v. Bartlet.* 2 *Roll. Rep.* 178. *Walker v. Bartlet*; and *post.* [364]. (*z*).

(*h*) 2 Co. 16. b. *Lane's case.*

* 1 *Leon.* 102. *Waterford's case.*

it is said, be only an extinguishment of *his* estate for life⁽ⁱ⁾, since that estate, *only*, they affirm, is united with the estate by deed. The estates in remainder are in other persons; and if *A.* were permitted to defeat them by his own act, it would be attended with manifest injustice. The argument of the late *Lord Chief Baron Gilbert*^(k) does not seem conclusive against the doctrine of the case now under remark, as the remainders were evidently *vested* remainders; and, consequently, the mere destruction of the estate limited to *A.* could not in itself destroy the remainders over. Should the lease
 [358] be determined during the life of *A.* he could never reclaim his copyhold interest, as it became wholly extinct on his acceptance of the estate by deed; but on his *death*, though not before ^(l), *B.* if in existence may enter.

And, in like manner, if a copyholder in fee surrender to the use of the lord for life,

(i) 2 *Leon.* 72. *Curtis v. Cottel.*

(k) *Ten.* 303.

(l) See *ante*, ch. 5. on Remainders, p. [192], &c. [197].

with remainder over to a stranger, or reserving the reversion to himself, it will only be an extinguishment of the estate so limited to the lord; for that limited to the stranger or reserved to the surrenderor will not be destroyed (*m*).

Thirdly; "the interests must be united in the same person *in the same right*:" for otherwise the copyhold interest will be suspended only. and in the same right.
Suspension.

If, therefore, a person have a copyhold interest in his own right, and a freehold interest either in the particular premises or in the manor generally, in the right of another, or *vice versa*, the copyhold interest will be only suspended while both interests continue in the same person.

Thus, if a copyholder marry a feme seignioress, the copyhold will only be suspended during coverture (*n*).

(*m*) See *Co. Copyh.* s. 34. *Tr.* p. 72.

(*n*) *Co. Copyh.* s. 62. *Tr.* p. 142. *Cro. Eliz.* s. ca. 1. *anon.*

[359] So if the lord marry a feme copyholder, the copyhold tenure will be suspended: but if he alien the manor, or die, the copyhold tenure will revive*.

How the interests may be united.

We will now proceed to inquire into the means by which such an union of the different interests may be effected; and this divides itself into two branches: the first is, when the copyhold interest comes to the freehold; and the second, when the freehold comes to the copyhold interest.

By the copyhold coming to the lord. As by release, surrender, &c.

If the copyholder, therefore, *releases* to the lord(o), or surrenders expressly to his use(p), or without declaring any use (unless there be any thing further to rebut the presumption,)(q), or if he does any other act which indicates a determination to relinquish his tenancy, as if he bargain and sell to his lord(r), or resign, or renounce his

* See *Plowd. Quarries*, Qu. 95. & 9 Co. 134. a.

(o) See *Gilb. Ten.* 300. *Hutt.* 65. *Sir W. Jones*, 42.

(p) See *ante*, ch. 3. p. [75]. [92].

(q) See *ante*, ch. 3. p. [92]. [109].

(r) *Blumershasset v. Humberstone*, *ubi sup.*

estate (s), the copyhold tenure will be extinct. For so soon as the relinquishment is effected, so soon must the copyhold interest be at an end; as a person cannot hold of himself, and be at one and the same time both tenant and lord*.

(s) *Calth.* 58. and *ante*, p. [54], &c. ch. 3.

* [And if the surrender be made to the lord and his heirs, the premises, in regard to which the copyhold interest is thus extinguished, will pass under a previous devise of the manor; and that notwithstanding a subsequent demise by the devisor from year to year. See 6 *Durnf. & East*, 708. *Roe d. Hale v. Wegg*. And in *Doe d. Gibbons v. Potts. Dougl.* 710. 8vo. ed. it was held, that copyhold lands purchased by the lord after a mortgage of the manor in fee, and the surrender taken to the mortgagor and his heirs, should enure to the benefit of the mortgagee as parcel of the manor, and that the equity of redemption passed under a settlement by the lord of all his estate mortgaged. So if a lord, tenant for life of a manor, with remainders over, purchase a copyhold interest and take a surrender thereof to him and his heirs, such copyhold interest will merge, and as parcel of the manor be subject to the previous limitations thereof: and though under a subsequent covenant by the purchaser to surrender such copyhold interest by way of mortgage, the mortgagee might compel a re-grant by the remainder-man: yet, in case of no such regrant having been made, the general devisees of the purchaser have no equity. 15 *Ves. Jun.* 167. *St. Paul v. Visct. Dudley & Ward.*]

[360] Again, if the lands which were held by copy escheat, or become forfeited to the lord, the copyhold tenure must be, in consequence, extinguished; as the lands then fall into the manor; and there can be no one to hold by copy till the lands be so granted by copy again (*t*).

By the freehold coming to the copyholder.

Secondly, an extinguishment will be equally caused by the copyholder acceding to the freehold interest. If he accept either mediately or immediately, a lease or feoffment of the freehold of the lands so held by copy, or of the manor generally, the copyhold interest will be utterly extinct (*u*). And so also if he take the manor by descent.

Observation. It is frequently said in our books, that if a copyhold escheat, and the lord afterwards

(*t*) If one having a manor, devise it, and afterwards a tenancy escheat, that also shall pass by the devise as being part of the manor. 1 *Salk.* 238. Admitted in *Bunter v. Coke*. And see *Roe d. Hale v. Wegg*. 6 *Durnf. & East*, 708.

(*u*) 4 *Co.* 31. a. & b. *Frenche's case*. 2 *Co.* 16. b. *Lane's case*.

lease the lands so escheated for years by deed, the copyhold will be extinguished for ever. But this mode of expression is inaccurate. The copyhold was equally extinguished before as after the lease. It was extinguished by the very act of escheating*. The moment it fell into the manor the extinguishment was completed. The lease by deed, would, it is true, prevent the lands [361] from being ever granted by copy again: but the extinguishment was wholly independent of such event. The lease is a destruction of the demisable quality of the lands; but it cannot operate as an extinguishment of that which had ceased to exist before the lease had a being. From the very instant the escheat took place the copyhold tenure was no more. A new grant by copy might have been made; but the old one was utterly and absolutely at an end. We ought not, therefore, to say, that such a lease operates as *an extinguishment*, but as *a destruction of the demisable property in the lands*.

* And see 2 Siderf. 19. (*Finch*).

CHAP. X.

OF ENFRANCHISEMENT.

[369]

Defined. **ENFRANCHISEMENT** is "the changing of the *tenure* from base to free;" and is effected by "the lord's conveying to the tenant the freehold of the particular and specific premises which were held by copy, or by releasing to the tenant his seigniorial rights."

Conveyance of the freehold to the tenant by the lord. *First*, then, it is effected "by the conveyance of the *lord* to the tenant;" for if the tenant convey or release his interest to the lord, it will not be an enfranchisement but an extinguishment^(w) of the copyhold. The lord had the freehold already in him, and the copyhold is now no more: no en-

(w) See *ante*, ch. 9. Of Extinguishment.

franchisement can, therefore, take place, as the tenure of the lord was already free.

But it is not essential that the conveyance of the freehold to the tenant be made *immediately* from the lord; for if the lord convey the freehold to a stranger, and the stranger convey it to the copyholder, the base tenure will be destroyed (x).

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The lord, in order to enfranchise absolutely, must be enabled to convey the fee simple of the freehold interest; for otherwise it will be only an extinguishment of the copyholder's interest, and a suspension of its demisable property during the existence of the estate so conveyed in the freehold.

Who may
enfranchise.

A lord, therefore, having only a partial interest in the manor, cannot enfranchise in fee. He can only communicate what he has himself; and his act shall not injure the rights of others, any more than persons

(x) See *Lane's case*. 2 Co. 16. b.

having such partial interest can, by their own act, absolutely destroy the demisable property of the copyhold.

Thus, if a lord be tenant for years, life, or in tail, and a copyhold escheat, and he make a lease for years at common law, it will not destroy the custom to regrant by copy only as to his own interest: the reversioner may grant it by copy again (y).

The conveyance must be to the tenant.

Secondly; The conveyance must be “to the tenant.” For should the lord convey the freehold of the premises to a stranger, it would be no enfranchisement of the copyhold, nor should it even operate as an extinguishment(z): as the act of the lord

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(y) 2 Roll. Alfr. 271. Prescription (T) pl. 1. 4. *Rusley & Conesby*. Cro. Eliz. 459. S. C. by the name of *Conesbie & Rusky*.

(z) Though the freehold be granted to a stranger in trust for the copyholder. Hob. 181. *Howard & Bartlet*. Cro. Jac. 573. *Waldoe & Bartlet*. 2 Roll. Rep. 178. *Walter & Bartlet*. Cro. Jac. 126. *Lashmer v. Avery*. And see 1 Vern. 392. *Dancer v.*

alone shall not prejudice the copyholder's estate (a).

By the conveyance of the freehold, the premises were severed from the manor, and, by consequence, must be held of the lord above. Should the grantee convey the freehold over to the copyholder the copyhold tenure would be extinct, as its existence would be incompatible with the freehold interest. Both tenures could not subsist together, and, by consequence, the less worthy would merge; the base would be absorbed in the free.

We have seen, that if the lord have only a partial interest, he cannot enfranchise in fee; but if the copyholder have only a par-

Tenant having a partial interest.

Evelt, and *quære* if that case be there well reported. See *Lord Nottingham's MSS.*

If the copyholder be enfeoffed to the use of others, the copyhold is preserved by the saving in the stat. 27 of *Hen. 8.* 7 *Co. 38. a.* *Ised's* case cited as so resolved.

(a) 4 *Co. 24. b.* *Murrel & Smith.* *Cro. Jac. 573.* *Waldoe & Bartlet.*

ticular estate in the premises, and he take a conveyance of the freehold in fee, it shall be an absolute enfranchisement; the copyhold tenure shall be extinct for ever. But the enfranchisement shall be for the benefit [365] of those in remainder, who would have taken the copyhold interest had the enfranchisement never taken place, as well as for that of himself; and a court of equity will, accordingly, direct a conveyance from the heirs at law of the particular tenant to him in remainder, on his paying a proportionate part of the consideration advanced for the enfranchisement (b).

The freehold must be conveyed.

Thirdly; It is "the conveyance of the *freehold*:" for the transfer of the *freehold* is of the very essence of enfranchisement.

As the separation of the freehold and copyhold interests in the specific premises is absolutely requisite to the very existence of the copyhold tenure, so the conveyance

(b) 1 *Brown. Ch. Cas.* 515. *Wynne & Cooke*
 2 *Ves. Junr.* 524. *Challoner & Murdoh*

of the freehold to the copyhold interest is necessary to enfranchise the premises.

When, therefore, it is intended to enfranchise a copyhold, such mode should be adopted as will convey the freehold of the premises: as a feoffment, bargain and sale, or the like. Though the release by the lord of the seigniorial rights, will equally effect an enfranchisement, as we shall presently see*.

Modes of enfranchisement.

Fourthly; The conveyance must be of the freehold "of the particular and specific premises which were held by copy."

The freehold conveyed must be of the very lands held by copy.

For if the *whole manor* descend or be conveyed to the copyholder, it will not be properly an enfranchisement of the copyhold, but an extinguishment of it; and the premises may be granted by copy again.

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* Grant of the freehold presumed after twenty years. See 2 Vern. 516-17. *Steward v. Bridger*. [The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. 11 East, 280. *Roe d. Johnson & Humphrey v. Ireland*.]

By the conveyance of the freehold of the specific lands, they become severed from the manor, but it is otherwise when the *whole manor* is conveyed. In the latter case the freehold is not affected; and the copyhold tenure is only extinguished by reason of the impossibility of the same person's being tenant and lord. The lord cannot hold of himself(c). The copyhold tenure, therefore, which before subsisted, is gone; but no alteration takes place as to the freehold tenure. The tenure, as to the lord above, remains as before; and the lands may be regranted by copy.

Release by
the lord of
his seigniorial
rights.

Again; an enfranchisement may be effected "by the lord's releasing to the tenant his seigniorial rights."

By the release, the tenure between the copyholder and the lord of whom he held by copy is extinguished; the premises are severed from the manor. The releasee must, therefore, necessarily hold of the lord above, as he must hold of somebody; and,

(c) See *ante*, ch. 6. Of Admission, p. [280].

agreeably to the well known rule of law, he must hold of the lord above by the same services as the mesne had held. Now the [367] mesne, if we may so call him, held the premises of which he released his seigniorial rights by frank tenure, and not by copy; and, of consequence, the releasee must now hold by frank tenure also (*d*).

The tenure was often changed by the release of the lord (*e*): and, in the present case, the copyholder, being tenant at will to the lord, there was a privity between them; and, consequently, the release of the lord to the copyholder would enlarge his estate and pass the freehold of the premises (*f*).

We come now to the consideration of the consequences of enfranchisement.

Consequence
of enfranchisement.

(*d*) And see *Litt. s. 146.* and *Co. Litt. 102. b. & 279. b. 280. a.*

(*e*) *Pasch. 49 Ed. 3. pl. 2. fol. 10. b. 2 Inst. 502.* And see *Coke's 5th Reading on Fines.*

(*f*) See *Litt. s. 460. Co. Litt. 270. b. and 13 Co. 55. Sammes's case.* [So words equivalent in substance to words of release, will operate as an enfranchisement. See 4 *East*, 271. *Doe d. Reay v. Huntington & al.*]

Separation
from the
manor.

Immediately on the lands being enfranchised in fee, they become severed from the manor, and held of the lord above under the same tenure and services as the former or mesne lord held.

Tenure.

The tenure, therefore, being extinct as to the enfranchising lord, he cannot, consequently, reserve to himself any services on

Services.

such enfranchisement. He has no reversion in himself; he cannot reserve a right of escheat. If any yearly or other payments are to be made by the tenant after enfranchisement, they may be good as rents-charge or seck, or obligatory on the tenant on his special covenants; but they cannot be good as services or renders in consequence of tenure, since the tenure which subsisted between them is utterly at an end (g).

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Customs.

Again; as the premises are absolutely severed from the manor, and the tenure

Litt. s. 215.

(g) *Mitch. 21 Ed. 4. pl. 32. fol. 62. a. 4 Durnf. & East, 443. Bradshaw v. Lawson. 2 Ibid. 705. Townly v. Gibson. The case in Moore, 143, Griffith v. Clarke, seems to have been an alienation before the stat. of Quia Emptores*.*

* [i. e. prior to 18 Ed. 1. But this could not have been the case, as the fine pleaded by the defendant is of the succeeding reign. See 4 East, 290.]

changed into frank-fee, all customs which attached to copyhold tenure within the manor of which they were before held, must of necessity have ceased with respect to them.

Thus if the custom be that the lands held by copy should descend to the youngest son, such custom would no more attach. Since the custom was, that all "*copyholds within the manor*" should so descend. Now, on enfranchisement, the premises are neither "*copyhold*" nor "*within the manor*;" and, consequently, not within the custom (*h*).

Descent.
See *Robins*.
Car. 13-4. &
qu. of the
doctrine there
laid down.

So all rights and privileges annexed to the copyholder's estate, as such, must also be done away; as the estate by copy to which they attached has ceased to exist: thus if a copyholder has common of pasture or esto-

Common.

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(*h*) In the cases of *Murrel & Smith*, (4 Co. 24. b.) and *Beale v. Langley*, (2 Leon. 208.) the freehold was merely severed from the manor by grant to a stranger; the copyhold interest remained. No enfranchisement, therefore, took place: and, consequently, those cases do not apply. So as to freebench. *Cro. Jac.* 126. *Lashmer v. Avery*. And see 2 *Siderf.* 19. (*per Finch*;) as to extinguishment.

ENFRANCHISEMENT.

vers in right of his copyhold, and the copyhold be enfranchised, the common is gone, since the copyhold is gone in the right of which it was claimed. As the estate is no longer copyhold, or even held of the manor, all customs relative to copyholds within the manor must fail as to the premises enfranchised. Such commonage will not pass by the word "appurtenances" in the deed of enfranchisement (i). The right of commonage must be expressly conveyed as a new grant (k). Though equity will, under certain circumstances, decree its continuance when it would be extinct at law (l).

(i) *Moore*, 667. *Fort & Ward*. *Cro. Jac.* 253. *Marsham & Hunter*, and see *S. C.* in 2 *Brownl.* 209. 1 *Brownl.* 173. *Lee v. Edwards*, and *ibid.* 220. *Masdam & Hunt*. *Yelvert.* 189. *S. C.* 2 *Lord Raym.* 1225. *Crowther v. Oldfield*. *Salk.* 170. & 364. *S. C.*

(k) *Moore*, 667. *Fort & Ward*. See also *Cro. Eliz.* 570. *Bradshaw v. Eyre*, and 794. *Worledge v. Kingswell*. [But where a copyholder has common in a waste of the lord *without* the manor of which his copyhold is parcel, he has the same as belonging to the land, and not to his customary estate: and such common without the manor is not extinguished by enfranchisement of the copyhold, though there be no words of regrant. See *Crowther v. Oldfield*, *ubi sup.* and 5 *Taunt.* 365. *Barwick v. Matthews & al.*]

(l) 2 *Vern.* 250. *Styamt v. Staker*.

ENFRANCHISEMENT OF COPYHOLD PREMISES BY WAY OF BARGAIN AND SALE.

THIS INDENTURE, &c. BETWEEN *A. B.* of, &c. lord of the manor of *C.* in the county of *D.* of the one part, and *E. F.* one of the copyhold tenants of the said manor, of the [370] other part: WHEREAS the said *A. B.* is seised to him and his heirs of an estate of inheritance in fee simple of and in the manor aforesaid, and the said *E. F.* is seised or possessed of the messuage, &c. herein-after particularly described, of an estate of inheritance in fee simple, by copy of court roll, at the will of the lord, according to the custom of the said manor of *C.* (the said copyhold messuage, &c. being within, and parcel of, the said manor.) AND WHEREAS the said *A. B.* hath agreed with the said *E. F.* for the consideration hereafter mentioned, to enfranchise the said messuage, &c. NOW THEREFORE THIS INDENTURE WITNESSETH, That, in pursuance of the said agreement, and in consideration of the sum of, &c. The receipt, &c. He the said *A. B.* HATH granted, bargained, sold, aliened, released, and confirmed, And by these presents, DOETH, &c. unto the said *E. F.* and his heirs, ALL that the said mes-

Recital that *A. B.* is lord of the manor and that *E. F.* holds of him by copy;

and that the lord has agreed to enfranchise the copyhold.

Grant of the freehold.

messuage, &c. Together with all ways, waters, watercourses, commons, &c. *And* the reversion, &c. *And all* the estate, right, title, interest, freehold and inheritance, claim and demand whatsoever, both at law and in equity, of him the said *A. B.* of, in, or to the said messuage, &c. **TO HAVE AND TO HOLD** the said messuage, &c. to him the said *E. F.* his heirs and assigns: *To the only proper use and behoof* of him the said *E. F.* his heirs and assigns for ever, **FREELY**, clearly, and absolutely, enfranchised, acquitted, and discharged by these presents, from henceforth for ever, of, and from all, and all manner of, yearly and other payments, rents, quit-rents, chief-rents, customary or copyhold rents, fines, heriots, fealty, suit of court, and all other usual or customary or copyhold payments, duties, services, or customs whatsoever, which by or according to the custom of the said manor of *C.* the said messuage, &c. hereby granted, bargained and sold, or any of them, is or are, or have or hath been, or ought otherwise to be subject or liable to, or charged with, or which otherwise ought to be paid, done or performed, for, or in respect of, the same messuage, &c. or any of them, or any part thereof, as copyhold, holden of, or as parcel of the said manor.

Free from
copyhold ser-
vices, &c.

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PROVIDED ALWAYS, and it is the true intent and meaning of these presents, and of the parties hereunto, that these presents, or any clause, matter, or thing herein contained shall not extend, or be deemed, taken, or construed to extend, to enfranchise or make free, the remaining or any other parts of the several copyhold lands or tenements (not herein before granted,) and now or late of him the said *E. F.*; or to acquit or discharge the said remaining or other parts from any payments, rents, quit-rents, fines, heriots, fealty, suit of court, or any other payments, duties, customs, or services, which by or according to the custom of the aforesaid manor, the said respective copyhold lands or tenements, or any of them, have at any time heretofore been subject or liable to, or charged with, or which have been or ought to have been paid, done, or performed, for or in respect of the said respective lands or tenements, as copyhold and parcel of the said manor. AND THIS INDENTURE FURTHER WITNESSETH, That, it being the intention of the parties hereto that the said *E. F.* and his heirs should for ever use and enjoy the same commonage in and upon all and every the wastes, commons and commonable lands of, or belonging to the said *A. B.* as lord of the said manor

Proviso not
to enfran-
chise other
copyholds.

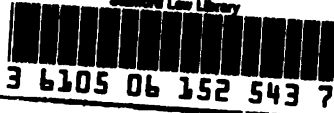
[372]

Grant of
common.

of *C.* notwithstanding the enfranchisement of the said messuage, &c. as he the said *E. F.* heretofore hath been, and now is, entitled to, by reason of the said copyhold premises intended to be hereby enfranchised, and to the end that such commonage may be the more effectually secured and conveyed to the said *E. F.*, *He* the said *A. B. DORN*, for the considerations aforesaid, and in performance of the said agreement, grant and confirm unto him the said *E. F.* and his heirs, *Al* commonage, right and title of common, of what nature soever, of, in, upon, to, or out of all and every the wastes, commons, and commonable lands, of or belonging to him the said *A. B.* as lord of the said manor of *C.* as aforesaid, whatsoever and wheresoever, which, and in as large and beneficial a manner, to all intents and purposes, as he the said *E. F.* could have exercised, claimed, or demanded, or in any wise have been entitled to, as a copyhold tenant, owner, or occupier of the said messuage, &c. if these presents had not been made. (*Then follow the usual covenants of title.*)

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